IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-86

BLAIR LEE III, ACTING GOVERNOR OF THE STATE OF MARYLAND, ET AL.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, AN AGENCY OF THE UNITED STATES, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners, Blair Lee III, Acting Governor of the State of Maryland (as successor to Marvin Mandel, Governor of the State of Maryland); State of Maryland; Maryland State Board for Community Colleges, State Board for Higher Education (as successor to Maryland Council for Higher Education), Board of Trustees of Morgan State University, Board of Trustees of St. Mary's College of Maryland, Board of Trustees of the State Colleges of Maryland, and The University of Maryland, each a separate agency of the State of Maryland; and Board of Trustees of the Community College of Baltimore, an agency of the Mayor and City Council of Baltimore, on behalf of itself and all other Public Junior and Community Colleges of the various political subdivisions lying within the State of Mary-

land, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on February 16, 1978.

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland, filed on March 8, 1976, and amended in minor respects on March 25, 1976, is reported in *Mandel v. United States Department of Health, Education, and Welfare*, 411 F. Supp. 542 (D. Md. 1976), and appears in the separately printed appendix to this petition (A. 1a). The unreported order of the district court that was appealed to the United States Court of Appeals for the Fourth Circuit was filed on March 9, 1976 (A. 44a). The reported opinion of the district court denying a stay pending appeal, filed April 20, 1976, is published as *Mandel v. United States Department of Health, Education, and Welfare*, 417 F. Supp. 57 (D. Md. 1976) (A. 48a).

The unreported order of the United States Court of Appeals for the Fourth Circuit consolidating the appeal in this case with one in the similar Baltimore City case with which it was decided in the district court, denying stays pending appeal and motions to expedite the appeals in both cases, and deferring the suggestions for hearings in banc, was filed on May 28, 1976 (A. 52a). The unreported order of the court of appeals granting rehearing in banc was filed December 10, 1976 (A. 53a). The original opinions of the court of appeals were filed August 9, 1977, and the separate opinion of Judge Hall on August 25, 1977; they are reported collectively as *Mayor and City Council of Baltimore v. Mathews*, 562 F.2d 914 (4th Cir. 1977) (A. 56a). The subsequent per curiam opinion of the court of appeals, withdrawing the original opinions and affirming by an equally divided court the orders of the district court, together with the

concurring and dissenting opinion of Judge Winter, was filed on February 16, 1978, and is reported as *Mayor and City Council of Baltimore v. Mathews*, 571 F.2d 1273 (4th Cir. 1978) (A. 91a). The unreported order of the court of appeals, granting respondents an extension of time within which to file a petition for rehearing until March 16, 1978 (which thereafter was not filed) was entered on February 28, 1978 (A. 97a).

The unreported order of the Chief Justice, extending the time to file a petition for certiorari to and including July 16, 1978, was filed on May 15, 1978 (A. 100a).

JURISDICTION

The original judgment of the court of appeals was entered on August 9, 1977. Petitioners filed a timely motion to withdraw the opinion and to modify the judgment, and, in the alternative, a petition for rehearing in banc which was granted on February 16, 1978, on which date a revised judgment was entered.

Thus, in accordance with 28 U.S.C. § 2101(c) and Rule 22.3 of this Court, the petition originally was due to be filed on or before May 17, 1978. On May 15, 1978, however, in response to an application under Rule 34.2 of this Court, the Chief Justice entered an Order, No. A-947 (A. 100a), authorized by 28 U.S.C. § 2101(c), extending the time for filing a petition for a writ of certiorari in this case to and including July 16, 1978. Because July 16, 1978, the expiration date of the sixty day extension granted, falls on a Sunday, under Rule 34.1 of this Court, the petition is required to be and is being filed not later than Monday, July 17, 1978.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether HEW violated title VI of the Civil Rights Act of 1964 by failing to issue regulations meeting applicable statutory criteria.

2. Whether HEW exceeded its statutory authority by refusing to conduct its title VI compliance activities on a program-by-program and institution-by-institution basis.

3. Whether HEW disregarded title VI by differentiating between states with a history of legal segregation and those with no such history.

4. Whether HEW violated title VI by refusing to engage in good-faith efforts to resolve alleged noncompliance by voluntary means.

5. Whether HEW exceeded its statutory authority under title VI by commencing administrative fund termination proceedings against all public institution of higher education in the State without complying with the jurisdictional prerequisites to the proceedings.

STATUTES AND REGULATIONS INVOLVED

United States Code (1976 ed.; vol. 1, pp. 332-34), Title 5, Sections 701-706:

These provisions appear in the separately printed appendix (A. 100a).

United States Code (1970 ed.; vol. 9, pp. 10290-92), Title 42, Sections 2000d-2000d-6:

This statute is set forth in the appendix (A. 104a)

Code of Federal Regulations (1977 ed.; vol. 45, parts 1-99, pp. 315-33), Title 45, Subtitle A, Part 80 (§§ 80.1-80.13):

The text of these regulations is reprinted in the appendix (A. 109a).

STATEMENT OF THE CASE

Introduction

The United States, in large part through the Department of Health, Education, and Welfare, extends federal financial assistance to each of the public institutions of higher education in the State of Maryland and to virtually every such institution in the United States. This assistance is made available under widely diverse statutory aid programs applicable to particular activities of the institutions and to the financial and other circumstances of their students.

The dispute in this case grows out of long disregard by HEW and its officers of an important federal law, title VI of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000d-2000d-6.[1] This disregard has been to the detriment of the public institutions of higher education in the State of Maryland,[2] but the Maryland experience

[1] The basic command of title VI, long followed by petitioners, is found in 42 U.S.C. § 2000d. It provides that, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Both title VI itself and the HEW regulations promulgated thereunder, 45 C.F.R. §§ 80.1-80.13, require HEW to focus its enforcement activities on particular statutory "programs" of federal financial assistance and on particular institutional "recipients" of that assistance. In addition, at the heart of title VI is a determination by Congress that "compliance . . . be secured by voluntary means," 42 U.S.C. § 2000d-1, if at all possible. Thus, after a violation has been properly found, notice to the recipient and good faith efforts to remedy the alleged discrimination are clearly required. *Id.* Over the years, HEW and a succession of its officers have ignored these commands, and they continue to do so.

[2] Petitioners are referred to hereinafter as the "State," and respondents as "HEW." HEW's Office for Civil Rights is referred to as "OCR."

The collective designation of petitioners as the "State" is not intended to imply that all petitioners are state agencies. On the contrary, the public junior and community colleges

is only an example of HEW maladministration of a law that affects all Americans. Ironically, although charged with enforcing title VI, HEW has ignored the commands of the statute in administering it. "This case is an important one with national implications,"[3] as is indicated by the support for HEW by the NAACP Legal Defense and Educational Fund, Inc., and for the State by the five leading national associations in the field of higher education and the Attorneys General of thirty-four states.[4] Unfortunately, HEW's current course apparently will not be altered until an authoritative ruling is issued by this Court, and neither petitioners nor the rest of the country should wait any longer for the resolution of the important issues presented by this case.

HEW's Abuse of Power

HEW's title VI activities in the State of Maryland began with a letter dated March 12, 1969, addressed to the governing boards of certain of the public institutions of higher education in the State. No specific violations of title VI or of any regulations promulgated thereunder were alleged. Nevertheless, citing racial statistics on student enrollment of certain institutions, the letters requested submission of a plan for eliminating alleged racial segregation. On October 1, in response to the threat to the State's continued eligibility to receive federal financial assistance, the State submitted for consideration by HEW a plan to assure the elimination of any segregation. HEW rejected the

are operated by the various political subdivisions lying within the State and are subject to only limited state controls.

[3] Mayor and City Council of Baltimore v. Mathews, 571 F.2d 1273, 1276 (4th Cir. 1978) (Winter, J., concurring and dissenting) (A. 94a).

[4] See notes 22 and 23, *infra* at 22-23.

plan, and after further interchange a second plan was submitted on December 1, 1970.

From December 1, 1970, until March 27, 1973, there was no communication from HEW with respect to the second plan or title VI compliance in general.[5] In a letter on March 27, 1973, HEW requested further information from the State with respect to the compliance status of the various public institutions. On May 21 HEW notified the six "State Colleges" and the University of Maryland that they were considered to be out of compliance with the provisions of title VI. Specifically, HEW concluded that, based upon "present disparities in the racial composition of the faculties and student bodies among the various institutions of the Maryland state system of higher education," the "prior dual system of higher education based on race" had not been fully disestablished. The May 21 letters demanded submission of a revised plan within three weeks, after almost three years of complete inaction by HEW.

In a letter of May 30 the State expressed, on behalf of the institutions, their inability to comply with the schedule for submitting the revised plan. In that letter, the State requested specificity about the requirements of title VI and the specific legal authority justifying HEW's actions. In response, the Director of OCR dispatched a letter on June 6 which cited two cases not involving title VI or HEW in any way and failed to

[5] The lack of communication was attributable to HEW's doubt about the proper methods of title VI enforcement in higher education. The renewed interest in the spring of 1973 did not represent further reflection by HEW and enlightenment on the proper approach, but was a direct response to a court ordering the commencement of title VI compliance activities with respect to a number of states, including Maryland. The court had directed that compliance be obtained by June 16, 1973. Adams v. Richardson, 356 F. Supp. 92 (D.D.C.), *modified and aff'd*, 480 F.2d 1159 (D.C. Cir. 1973). None of the states affected by the order was a party to the litigation.

specify any violations by public institutions in Maryland.

Following six months of informal exchanges,[6] in early 1974 the State submitted yet another plan for assuring the elimination of any segregation in the public institutions of higher education in the State.[7] In a letter of April 22, 1974, HEW furnished ten pages of criticism of the most recent Maryland plan and requested a revised version by June 1, but again failed to specify any violations of title VI. On May 3 the State reiterated its request that HEW specify the requirements of title VI and the legal basis for those requirements. HEW's response of May 15 only referred to title VI itself and to the HEW regulations promulgated thereunder and expressed the hope that "we are not returning to such a debate at this late date." The State provided a revised version of the plan on May 30.

HEW communicated to the State its unconditional acceptance of the Maryland plan in a mailgram on June 21, confirmed by letter of July 19, 1974. The letter stated HEW's intention to "closely monitor the implementation of the plan, particularly in the first two years of its life." Those two years were to expire on July 19, 1976, but HEW began to object to the approved Maryland plan almost immediately after its acceptance.

By letter dated September 19, 1974, the Director of OCR, Peter Holmes, informed the Executive Director of the Maryland Council for Higher Education that primary responsibility for reviewing the implementation of the Maryland plan had been delegated to the Philadelphia Regional Office of OCR headed by Respondent Dodds.[8] Less than three months after referral of the plan to the Region III office, in an undated letter received on December 11, Mr. Dodds asked over one hundred questions concerning the plan itself and requested a response to those questions within thirty days of receipt of the letter.[9]

[6] The deadline imposed upon HEW by the district court in Adams v. Richardson had meanwhile been extended by the court of appeals.

[7] In the letter of transmittal accompanying the plan Governor Mandel noted that, despite the lack of direction from HEW during the three-year period of silence, the State had made substantial progress in implementation of its 1969 plan.

On February 14, 1975, the State submitted to HEW the "First Annual Desegregation Status Report (February 1975)." The report contained approximately 600 pages of data reflecting the substantial progress that had been achieved in the implementation of the plan. The report, however, was largely unread by respondents, who throughout the entire course of communication, concentrated almost solely on statistics concerning the racial composition of full-time undergraduate students in the various institutions.

On August 1 the State formally transmitted to HEW the "First Mid-Year Desegregation Status Report (August 1975)." That report went unconsidered by respondents, although it evidenced progress made by the State in the public institutions of higher education implementing the previously approved plan. In fact, long before submission of the First Mid-Year Report, HEW had decided to send a letter to the State noting deficiencies in the plan and demanding corrective action.

The result of this decision was a letter on August 7 from HEW to Governor Marvin Mandel that demon-

[8] At that time, Mr. Holmes relinquished his personal control of the title VI enforcement activities for higher education in the State of Maryland, delegating that responsibility to individuals who had been opposed to acceptance of the plan from the beginning.

[9] In the State's view, acknowledged by the district court, this letter represented a "renewed attack on the plan" and a "de facto revocation of the prior approval." 411 F. Supp. at 548 n.15 (A. 12a n.15).

strates HEW's intention to control higher education, and even the legislative process, in the State. Matters formerly thought to be within the educational discretion of the administrators of the various institutions or within the legislative discretion of the Maryland General Assembly were now to be subject to HEW revision and approval.[10] It would have been impossible for the State to comply with all of the demands made in

[10] The letter demanded that HEW's Office for Civil Rights be furnished with procedures and standards by which the institutions must award credit for skills acquired outside the academic setting. The institutions were required to allocate financial resources for remedial programs, and to overcome financial handicaps, inadequate educational backgrounds, and unfair and discriminatory social conditions. Presumably, the programs and the resource allocations were in all respects subject to the approval of HEW. HEW was also to be involved in the hiring process, for Governor Mandel was ordered to utilize new faculty positions "to correct existing imbalances in the racial distribution of faculty." None of these demands was tied to involvement of federal financial assistance at any or all of the institutions affected. Similarly, the letter demanded a reform of the state scholarship program, which involves no federal dollars. Dissatisfied with the nature and extent of powers given the Maryland Council for Higher Education by the laws of the State of Maryland, HEW demanded that those powers be increased.

Most significantly, HEW asserted approval power over admissions policies and curriculum offerings at the various institutions. Apparently, academic decisions were to be made with an eye to desegregation in the areas of "academic program, facilities, establishment of new institutions, and admissions policy modifications." No new programs could be implemented at any of the institutions without submitting to HEW a justification that each new program "will in no way impede desegregation." All contemplated new facilities had to be submitted for HEW's approval in the form of a "proposal" with a justification that construction or modification "will in no way impede desegregation."

Indeed, HEW has demanded that the State analyze the "roles" of each of the public institutions of higher education in the State and promptly "redefine" them with a view to desegregation. Thus, HEW's approach to title VI enforcement has led it to assert the right to govern all higher education in the State.

the letter of August 7 within the specified time periods. In fact, many of the demands were themselves impossible of performance within the specified time periods, and HEW knew this at the time the letter was sent.[11]

In a letter of August 13 Governor Mandel exposed the August 7 letter as a "unilateral repudiation by the Office for Civil Rights of the plan itself and of OCR's approval of it a year ago." There followed efforts to resume negotiations, including a number of meetings and discussions between representatives of the State and HEW. Indeed, by letter dated September 26, the Director of OCR, Peter Holmes, informed the State that the time limits imposed by the August 7 letter were to be held in abeyance. This representation that the time limits were in abeyance was never rescinded.

[11] For example, amendment of the state scholarship program required legislative action, and HEW officials knew that the state legislature was not in session at the time of the letter and would not be in session within the time periods given for completion.

The district court found that certain of the times specified in the letter for completion of various demands were "unreasonable" and "outrageous." 411 F. Supp. at 548 & 548 n.17 (A. 12a & 12a-13a n.17). The district court also cited the testimony of then-Lieutenant Governor Blair Lee III, characterizing the letter, addressed to the Governor of the State of Maryland, as a "terrible letter" employing the most "peremptory kind of language" possible. 411 F. Supp. at 548 n.16 (A. 12a n.16).

The sudden dispatch of the August 7 letter, in advance of the scheduled receipt of the imminently forthcoming First Mid-Year Report, was precipitated by agitation on the part of the plaintiffs in the Adams v. Richardson case. The plaintiffs in *Adams* had been dissatisfied with the Maryland plan since its acceptance and had been agitating for further action by HEW. Respondent Burton Taylor, then Chief of the Policy Planning and Program Development Branch of the Higher Education Division of OCR, attributed the unusual pressure put upon him to complete his review of the letter to the filing, at the very end of July, of a motion for further relief by the plaintiffs in the *Adams* case.

Subsequently, however, Defendant Martin Gerry assumed Mr. Holmes' duties on an acting basis. Within two weeks, without warning, there was dispatched to the State a letter dated December 15 in which fund termination proceedings were announced.[12] Indeed, before receipt of the letter by the State, HEW officials held a press conference to discuss the importance of their actions and announce the imminent commencement of administrative enforcement proceedings in which all federal financial assistance through HEW to all public institutions in the State, as well as federal financial assistance distributed to the institutions through other agencies, would be at risk.

Proceedings in the District Court

Three weeks later, on January 5, 1976, the State of Maryland, its Governor, certain state agencies involved in higher education, and the public institutions of

[12] The reasons for the December 15 letter became apparent at the hearing before the district court. On August 29, 1975, Mr. Gerry (then Acting Director of OCR during Mr. Holmes' illness) had advised then-Secretary Mathews to commence enforcement proceedings because it would assist in the *Adams* litigation, stating:

> In any event, the initiation of an enforcement action will greatly assist in building our credibility with other states and with the court [in *Adams*].
>
> The other issue presented is really a symbolic one. If we initiate enforcement action against Maryland we have the option of also deferring the state's eligibility for new Federal funding. As best we can determine, very little money would be affected by such a decision. It would, however, be regarded by the civil rights groups as a symbol of our sincerity in putting maximum pressure on institutions to voluntarily comply. For these reasons, we recommend in favor of imposing the deferral.

In an *"ACTION MEMORANDUM"* of the same date, Mr. Gerry advised Secretary Mathews that failure to commence administrative enforcement proceedings "could seriously jeopardize our position in the current *Adams* litigation" and that bringing such proceedings would appease civil rights groups and "quiet" the Governor.

higher education located in the State filed suit in the United States District Court for the District of Maryland against HEW and certain of its officers.[13] Filed with the complaint was an application for temporary,[14] preliminary, and permanent injunctive relief seeking the restraint of certain actions by HEW alleged to be arbitrary and capricious, unwarranted, *ultra vires*, illegal, and unconstitutional as outside the scope and in direct contravention of the legal authority of HEW and the individual defendants. Specifically, the complaint alleged that HEW had exceeded its statutory authority under title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-6, and further that HEW had, through actions taken in bad faith and in violation of applicable law, deprived the State of certain statutory rights. On January 13 HEW and the individual defendants moved to dismiss the complaint.

At evidentiary hearings before the district court on January 30 and February 2, it was demonstrated that HEW had refused to concentrate on particular statutory programs and on particular institutional recipients in administering title VI; that is, it had deliberately failed to take a "program-by-program" approach and an "institution-by-institution" approach as required by title VI. Indeed, HEW had never examined, and was only casually aware of the various statutory aid programs and of the particular institutional recipients thereof.

For example, Respondent Dewey Dodds, the Regional Civil Rights Director for Region III of OCR, could not identify a single statutory assistance program through

[13] Jurisdiction was alleged under 5 U.S.C. §§ 701-706 and 28 U.S.C. §§ 1331, 1332, 1346, 1361, and 1651.

[14] At a hearing held January 5, 1976, the district court did not grant the temporary restraining order sought by the State but scheduled a hearing on the State's application for preliminary injunction for January 30, 1976.

which federal aid is made available to any institution of higher education in the State. He was unfamiliar with the general or specific purposes for which federal aid was being utilized. He conceded that his office had never focused on particular aid programs or on the particular institutional recipients of the aid to determine whether any federal financial assistance was being utilized in a discriminatory fashion. Mr. Dodds could not cite a single specific instance of discrimination by any public institution of higher education in the State; and although he was able to enumerate specific criteria for determination of institutional discrimination, he admitted that he had no evidence that any of the institutions failed to meet any of those criteria.

Moreover, Respondent Taylor, who is now a Special Assistant to the Director of OCR, testified that the public institutions in the State were in violation of title VI and the HEW regulations promulgated thereunder. However, he also admitted that he had made no analysis of the various programs of federal financial assistance through which funds are distributed to the various institutions, as did Defendant Martin Gerry, then Acting Director (later Director) of OCR, and Peter Holmes, Mr. Gerry's predecessor as Director of OCR.

Just as respondents conceded their failure to analyze the utilization of federal aid under the various statutory programs, they also conceded their failure to analyze each of the particular public institutions to determine the existence of discrimination, either generally or in the use of federal financial assistance. Respondents acknowledged that for purposes of title VI compliance each public institution of higher education in the State is a "recipient" as defined in the statute and regulations. When read a list of the public institutions of higher education in the State, Mr. Dodds acknowledged that he knew of no discrimination at any of them.

He identified the title VI problem as being the existence of "vestiges of the dual system." Asked to identify the vestiges, Mr. Dodds stated that students "continued to go to school based on the race of the institution that exist there." After further questioning, it became apparent that the alleged title VI problem in Maryland did not arise from HEW's belief that white students choose to go to predominantly white institutions or that predominantly white institutions discriminate against blacks or attract them in insufficient numbers. The core of the problem was that black students choose to go to predominantly black institutions.

Thus, the HEW approach had been to impute a problem perceived by it in certain predominantly black institutions to the remaining institutions without evidence—indeed, without looking for evidence. Mr. Taylor's testimony demonstrated the HEW approach. Asked what evidence he had that Frostburg State College violates title VI, he was able to respond only that it is "part of the Maryland public higher education system." Mr. Taylor conceded that Hagerstown Junior College finds its federal financial assistance in jeopardy not because it has been involved in discrimination but because it would be useful in fashioning a remedy to the general title VI problem perceived by HEW.[15]

[15] He acknowledged that the various public community and junior colleges operated by the political subdivisions of the State, including Hagerstown Junior College, had never been part of a legally "dual" system and that they bore no "vestiges of racial duality." He conceded that HEW had made no attempt to determine compliance with Title VI by particular institutions, that is, by particular "recipients" of federal financial assistance. He added that the "remedy" approach had been taken not only with respect to the public junior and community colleges in the State but also with respect to other institutions of public higher education in Maryland.

Defendant Gerry's testimony concerning Garrett Community College was particularly instructive. He was asked in detail how Garrett Community College violated title VI.[16] Mr. Gerry had no evidence that any black students failed to attend Garrett Community College because of the existence of predominantly black institutions in the State. He had no evidence that Garrett Community College has failed to meet its obligations, if any, to implement the Maryland desegregation plan. Nonetheless, according to Mr. Gerry, and according to HEW, Garrett Community College was in violation of title VI. The reason for this alleged violation was Mr. Gerry's notion of collective responsibility for title VI compliance, supposedly shared by all institutions of public higher education situated in the State, whether operated by the State itself or by its political subdivisions. Under the HEW theory, Garrett Community College would be held responsible for the existence of an alleged title VI problem at predominantly black Morgan State University, notwithstanding that Garrett might be absolutely powerless to affect Morgan's alleged problem.

[16] Garrett Community College, with a 1974 enrollment of 146 full-time equivalent students, is a commuter institution located in far western Maryland. It has no residence facilities and is intended to serve Garrett County, Maryland, although students from other counties may attend if they are willing to pay a tuition premium. The percentage of black prospective students residing in Garrett County, Maryland, is zero. The Maryland Plan for Completing the Desegregation of the Public Post-Secondary Education Institutions in the State, unconditionally accepted by HEW in June of 1974, establishes as a 1980 mid-range goal a black student enrollment at Garrett Community College of zero percent. This goal reflects the fact that there are no black students in the area served by Garrett Community College and that it is highly unlikely that black students (or any students) from elsewhere in the State would pay higher tuition rates to commute to Garrett Community College or would establish a residence in Garrett County for the purpose of attending Garrett Community College without paying the tuition premium.

At the hearing, there was considerable evidence concerning the widely diverse federal financial assistance distributed to the various institutions of public higher education in the State. The purpose of this evidence was to demonstrate what HEW would have found had it taken a program-by-program and institution-by-institution approach as is required by the statute and regulations.

For example, of the twenty-four million dollars in federal aid received by the Baltimore City campus of the University of Maryland, one-fourth goes to the Baltimore Cancer Research Center, which is totally supported by the National Cancer Institute and is the unique facility in the United States for the study of lymphatic cancer. It serves 37 inpatients per day and 1,000 outpatients per week. But if federal support were lost, the Baltimore Cancer Research Center would have to close its doors, despite the fact that no allegations of discrimination have ever been made against it. In another example brought out in testimony, it was uncontradicted that the majority of federal money going to Towson State University aids black students and, in fact, the school's desegregation efforts have been praised by HEW. Nevertheless, Towson stands to lose three and one-half million dollars annually if the HEW attempt to cut off federal funding is successful. In the face of such testimony, the district court was later to note that all of these programs, "due to the non-programmatic approach assumed, are being condemned by defendants en masse." 411 F. Supp. at 558 (A. 32a).[17]

[17] The court recognized in its opinion that the programmatic approach would reduce HEW's ability to "wield a $65,000,000 . . . sledgehammer. However, that result appears to be a necessary concomitant of protecting the innocent beneficiary of Federal funding." 411 F. Supp. at 559 n.34 (A. 33a n.34). The district court said:

> [T]he beneficiaries under these programs — the cancer victims, disadvantaged students, the ultimate recipients

Final arguments were scheduled for February 20, 1976. Faced with a further threat by HEW to take additional action to the detriment of the State before final relief, however, the State renewed its application for a temporary restraining order on February 18. A hearing was held that same date, and the district court granted the relief sought.

On March 8 the district court filed a 51-page opinion sustaining the contentions in the complaint and indicating the appropriateness of relief. Certain aspects of HEW's dealings with the State were cited by the district court as extraordinary examples of irresponsibility in the title VI administrative process. First, HEW has refused to specify, or even suggest, what constitutes compliance with title VI and what steps ought to be taken to achieve that compliance. The district court noted that "[t]he record bears witness to the absolute dearth of definitive standards provided by defendants, as well as the numerous requests for guidance by the plaintiffs." 411 F. Supp. at 550 (A. 16a). The title VI regulations provide no guidance whatsoever. Entitled "Non-Discrimination under Programs Receiving Federal Assistance Through the Department of Health, Education and Welfare — Effectuation of title VI of the Civil Rights Act of 1964," they have never contained any standards for institutions of higher education.

> of the health care programs, etc. — should not suffer for the sins of a program not administered in accordance with this Act. For instance, the cancer patients receiving treatment at the Baltimore Center, should not be compelled to face imminent discontinuance of the Center with the concomitant inability to obtain vital treatment, nor should the minority students, many of whom are totally dependent on federal funding, be fearful of loss of government aid due to an agency's misdirected attempts to enforce the Civil Rights Act.

411 F. Supp. at 561 (A. 37a).

In light of the evidence, the district court was compelled to conclude that the HEW refusal to adopt a programmatic approach was "vindictive." 411 F. Supp. at 563-64 (A. 42a).

Indeed, they do little more than reiterate the statutory prohibition against discrimination in general.[18]

Another aspect of HEW's conduct specially noted by the district court was the refusal to implement a consistent policy regarding the importance of statistics. From the very first communication of March 12, 1969, it is clear that HEW premised all of its findings of noncompliance upon statistics.[19] Despite the repeated

[18] In expounding on the State's inability to comply with the three-week deadline imposed in 1973 after the three-year period of HEW inaction, Governor Mandel reiterated a number of the questions that Maryland had then been asking for more than four years, stating, "[W]e need to have specific answers." "What is the minimum acceptable black component at each institution?" "[W]hat does [HEW] favor for quantifying compliance with Title VI?" "Does [HEW] require a student composition roughly equivalent to the racial composition of the State's population?" "What does 'elimination of racial identifiability' really mean?" No answers were ever forthcoming to these questions.

Indeed, Dr. Thomas B. Day then Vice Chancellor of the College Park Campus of the University of Maryland and a member of the Governor's Desegregation Task Force, testified to his "impression that somehow there had been a decision [that HEW] would not give us guidelines, that we would just submit a draft and they would say, well, that's pretty good but try harder and we would submit another draft and they would say that's better, try harder, and never got out of that mode." Dr. Day's impression was correct, as confirmed by a memorandum from Defendant Gerry, quoted by the district court, wherein he recommended against giving guidance to the State and stated: "[I]t would seem prudent to place the burden for developing a plan on the State. If we make specific suggestions we are as a practical matter stuck with them whether they 'work' or not." 411 F. Supp. at 551 n.21 (A. 18a n.21).

[19] In then-Lieutenant Governor Lee's words:

> There was a continuing absence of firmness as to the significance of numbers. Whenever the Department made a Complaint that the State was not doing right, in their eyes, they seemed to base it on the numbers, on the racial composition in the several institutions. But if you ask them whether the numbers were important, they would say no . . . . And then we would ask them how do

disavowals by HEW if the importance of numbers, the final decision to commence administrative enforcement proceedings against the public institutions of higher education in the State was premised on statistics concerning the race of students enrolled at the various institutions.[20]

The district court summarized the testimony with respect to the use of statistics as follows:

> Evidenced throughout the entire course of dealings are myriad examples of defendants' duplicitous posture in regard to statistics. While repeatedly denying that their decisions were based on statistics, the defendants nevertheless consistently explicated Maryland's violation of Title VI by citing statistics.

411 F. Supp. at 551-52 (footnote omitted) (A. 18a-19a).

As noted by the district court, related to the problem with statistics has been failure by HEW to adopt a

> you measure the results of the process that they were so interested in, aimed at eliminating racial identifiability, and they'd say — then you'd come back to the numbers, the only way you can measure the success, the results, the only way you can quantify the success is by looking at the numbers, the racial composition. But the numbers, mind you, are not important . . . .

Dr. Day gave similar testimony concerning the "very significant apparent inconsistency in the posture about numbers."

[20] In his letter to Governor Mandel of December 15, 1975, Defendant Gerry stated:

> More serious than Maryland's failure to implement its plan is the segregation which continues to exist at the post secondary institutions throughout the state . . . . [T]he percentage of black students at the predominantly black colleges in the State system was 86.9 in 1974, while the percentage of black students at the predominantly white senior institutions was 7.4 for the same period. *These figures clearly reveal that the State is continuing to operate a dual system of higher education.* (emphasis supplied).

consistent policy with respect to the maintenance of predominantly black institutions of higher education. These institutions are, in HEW's admitted view, the major source of the title VI problem in the State, but HEW has been consistently ambiguous as to whether they will be permitted to retain their racial characteristics.[21]

[21] Testimony on this important, unanswered question was given by Dr. Andrew Billingsley, President of Morgan State University, and an expert in the field of higher education, particularly higher education of black students. Dr. Billingsley indicated that the HEW position "attacks the predominantly black character of those institutions and ignores the importance of their history and their culture." Dr. Billingsley noted that Morgan State University is today a predominantly black institution because of voluntary selection by students. He testified to the absence of any influence by the State which affected the choice of Morgan State University by its students.

The purpose of Dr. Billingsley's testimony was not to demonstrate that he is correct about the need for maintenance of predominantly black institutions. Rather, the purpose was to demonstrate that, in this area of serious educational concern, the crux of Maryland's alleged violation, HEW was acting to destroy the racial character of predominantly black colleges without ever articulating that policy or any policy concerning them. As early as 1970, then-Lieutenant Governor Lee posed to HEW the question of the survival of the predominantly black institutions, but it was not answered at the time and has not been answered to this day. Indeed, at one time, HEW suggested that the problem of increasing the percentage of black students in historically white institutions might be settled by importing "a lot of black students in from other states."

Despite enforcement activities directed toward destruction of the predominantly black institutions, HEW's public pronouncements have been that the institutions should be enhanced and that it has "no objection to institutions that were predominantly black in racial composition." By contrast, Respondent Taylor testified that in order for the State to demonstrate a prima facie case of compliance with title VI it would be necessary for the racial characteristics of each public institution to reflect the racial characteristics of the State as a whole. In fact, as early as November 1969, HEW was taking the position that all colleges must be made

Characterizing the HEW title VI enforcement activities with respect to the State of Maryland, the district court found that respondents "have not followed the mandates of the Act in that they have arbitrarily and whimsically failed to attempt to work toward compliance by voluntary means and have vindictively refused to assume a programmatic approach." 411 F. Supp. at 563-64 (A. 42a). At the direction of the court, and with the participation of counsel for HEW, counsel for the State prepared an order conforming to the opinion, which order was signed by the court on March 9, 1976 (A. 44a). Counsel for HEW did not object to the form of the order except in one aspect which was not raised on appeal.

Review By the Court of Appeals

On March 24, 1976, HEW filed its notice of appeal. HEW then sought from the district court a stay of the order pending appeal, which was denied by the district court on April 20, 1976. 417 F. Supp. 57 (D. Md. 1976) (A. 48a). On May 28, 1976, the court of appeals also denied a stay pending appeal (A. 52a). In the same order, the court of appeals consolidated the appeal with HEW's appeal in the Baltimore City case (involving its elementary and secondary schools) that had been decided by the district court at the same time as the State's case and deferred suggestions for in banc consideration of the cases. Thereafter, extensive briefs were filed by the parties, as well as by various amici curiae on behalf of HEW[22] and the State.[23]

"majority white quickly" and that the institutions must "approximate the ratio of black and white students in the state as a whole who attend college."

[22] The NAACP Legal Defense and Educational Fund Inc., appeared as amicus curiae in support of HEW.

[23] The nations's five leading associations in the area of higher education (The American Council on Education, The Association of American Universities, The National Association of State Universities and Land Grant Colleges, The

On December 9, 1976, the consolidated cases were argued before a panel of the court of appeals, which recessed and announced that in banc reargument would be granted. An order to that effect was entered the next day (A. 53a).

The court of appeals, sitting in banc, heard reargument of the consolidated cases on February 14, 1977, at which time all seven judges then in regular active service participated. On August 7 an opinion was filed, noting the concurrence of four judges (including the Honorable J. Braxton Craven, Jr., who had died in the interim on May 3), which held that HEW's failure to adopt nondiscrimination guidelines applicable to higher education rendered its attempted initiation of fund termination administrative proceedings *ultra vires* and that an injunction against initiation of such proceedings was proper. The opinion, however, directed the district court to reissue its injunction to set a timetable for HEW to issue nondiscrimination guidelines, the State to submit a revised plan for complying with them, and HEW to accept or reject it.[24] 562 F.2d

American Association of State Colleges and Universities, and The American Association of Community and Junior Colleges), The National Association of Attorneys General, and thirty-two States and Commonwealths (The States of Alaska, Arizona, Connecticut, Delaware, Florida, Idaho, Illinois, Iowa, Kansas, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oregon, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming, and the Commonwealths of Kentucky and Virginia) all appeared as amici curiae in a single such brief supporting the State. In addition, two separate briefs supporting the State's position were filed by the Commonwealth of Pennsylvania as amicus curiae and by the Trustees of the California State University and Colleges and the Regents of the University of California as amici curiae.

[24] By the same opinion the court of appeals reversed the injunction in the Baltimore City case, remitting the City to its fund termination hearing, and rejecting in the process the

914 (4th Cir. 1977) (A. 75a). Three judges, in two separate opinions, dissented on the basis that the district court's injunction was appropriate.[25] 562 F.2d 914, 925-28 & 928-33 (A. 57a, 75a-80a & 80a-90a).

On August 22 the State filed a motion to withdraw the opinion and to modify the judgment, and, in the alternative, a petition for rehearing in banc, on the principal ground that the vote of Judge Craven should not have been counted in forming a majority of the court and urging that because the remaining six members of the court were equally divided, the district court's injunction should be affirmed.[26] After directing an answer from HEW, and receiving it on September 22, the court of appeals, on February 16, 1978, granted the State's motion and affirmed the district court's injunction by an evenly divided court.[27] 571 F.2d 1273 (4th Cir. 1978) (A. 91a). Judge Winter, alone, dissented from the affirmance, but not from the withdrawing of the earlier judgment of August 9, 1977. He noted

> This case is an important one with national implications . . . .
>
> . . . .
>
> Although the cases were decided in the district court by the granting of a preliminary injunction, an analysis of the record and the evidence before the district court makes it clear that on remand the

City's argument that title VI required programmatic enforcement. 562 F.2d at 922-24 (4th Cir. 1977) (A. 69a-73a). The State's similar argument was not reached by the opinion, although it apparently was implicitly rejected. 562 F.2d at 924 (A. 69a-70a).

[25] They also believed that the injunction in the Baltimore City case should have been affirmed.

[26] A similar motion was filed by Baltimore City in its case the following day.

[27] In the same opinion, the court of appeals withdrew its previously filed opinions in both cases and similarly affirmed the district court injunction in the Baltimore City case.

> entry of a permanent injunction will be a *pro forma* action. From the very full record before us, it is inconceivable to me that there is additional evidence to be considered by the district court . . . .
>
> . . . .
>
> . . . . [I] think that we quite unnecessarily subject the parties to the formality of the entry of a permanent injunction and the expense and inconvenience of a second appeal when it is perfectly obvious that we can give no definitive answer to the basic questions presented by these consolidated appeals until there is a full court.

571 F.2d at 1276 & 1277 (A. 94a, 95a, & 96a).

Respondents thereafter sought, and obtained on February 28, 1978, an extension within which to seek rehearing in the consolidated cases (A. 97a), but no rehearing was sought. Subsequently, on May 5 HEW sought an extension of time until June 16 to file a petition for certiorari in this Court, apparently only in the Baltimore City case. On May 8 petitioners sought an extension that would permit additional time in the State case. By separate orders, granted on May 15, the Chief Justice extended HEW's time in the Baltimore City case until June 16 and petitioners' time until July 16 in this case. While, without explanation, no petition was filed in the City case, this petition has been timely filed by the State because of the pressing need to resolve at the earliest possible date the issues of national importance it presents.

REASONS FOR GRANTING THE WRIT

REVIEW BY THIS COURT NOW IS NECESSARY TO DECIDE URGENT FEDERAL LAW QUESTIONS OF NATIONAL IMPORTANCE REQUIRING PROMPT AUTHORITATIVE RESOLUTION

> *"It was our desire to comply with Title VI in every way, in every way that made sense, as long as it didn't involve literally destroying our higher education system."* [411 F. Supp. 542, 550-51.]

These words, from the testimony of then-Lieutenant Governor Blair Lee III before the district court, explain perhaps better than any others the reasons for this petition. The commitment of petitioners to the ideals of title VI (and for that matter to the proposition that no resource, State or federal, be used in a racially discriminatory manner) is unswerving, and thus petitioners believe that review by this Court is necessary now to decide authoritatively the urgent federal law questions of national importance that this case raises.[28]

Upon an exceptionally full record, the district court found, and on this point the court of appeals unanimously affirmed, that respondents had acted "patently in violation of the prescriptions of [42 U.S.C.,] Section 2000d-1." 411 F. Supp. at 553 (A. 22a). The lower courts held that respondents had deliberately disregarded the provisions of title VI throughout their dealings with the State. They had refused to focus on particular federal statutory aid programs to determine the existence of discrimination. Instead, they had threatened all programs for the apparent purpose of adding to the coercive strength of their demands for restructuring the

[28] *See* Trans World Airlines v. Hardison, 432 U.S. 63, 70 n.5 (1977), in which the Court discussed its grant of certiorari to a prevailing party in the court of appeals. *Cf.* United States v. Lovett, 328 U.S. 303 (1946), where the Court decided a case in which the Solicitor General filed for certiorari even though the Court of Claims had adopted his views.

system of higher education in the State. They had ignored the statutory command to promulgate regulations generally applicable to aid programs supporting higher education. Instead, despite repeated requests for specificity, respondents had consistently refused to provide state officials with standards by which compliance could be determined. The had refused to comply with 42 U.S.C. § 2000d-6 which requires that title VI be applied uniformly in all regions of the United States whatever the origin or cause of alleged segregation. Instead, they had applied title VI only to states with a history of legal segregation. Title VI requires that once a violation has been identified, there be efforts to secure compliance by voluntary means. The lower courts have held that respondents' actions during the period of alleged efforts toward voluntary compliance were arbitrary, whimsical, vindictive, and in bad faith.

The district court's order (A. 44a), now affirmed on appeal, stops respondents "from asserting that there is non-compliance with Title VI in the administration of any and all statutory aid programs . . . on the basis of non-compliance alleged to exist in any other program's and/or any other institution . . . ." In addition, the order enjoins respondents from initiating fund termination proceedings or otherwise deferring or interfering with the award of federal funds to the public institutions of higher education in the State unless and until respondents shall have complied with the procedures established by title VI itself. Specifically, before taking any such actions, HEW officials must promulgate uniform regulations of nationwide applicability setting standards for compliance with title VI which shall apply equally whatever the cause of discrimination, determine which if any aid programs administered by public institutions are not in compliance with these regulations, and attempt in good faith to achieve compliance by voluntary means.

Thus, the district court's disposition stands as an indictment, conviction, and probationary order respecting respondents' nationwide policy of administering title VI. In addition, as noted by Judge Winter in the withdrawn "majority" opinion of the court of appeals, "the decree entered by the district court effectively terminates the litigation." 562 F.2d 914, 925 (4th Cir. 1977) (A. 74a). More importantly, however:

> Since the district court did not enjoin the secretary from carrying out his duties under Title VI, and since Title VI requires him to take steps to achieve compliance, the preliminary injunction may be fairly characterized as a mandatory injunction requiring the Secretary to take the various actions set forth . . . .

571 F.2d 1273, 1276-77 (4th Cir. 1978) (Winter, J., concurring and dissenting) (A. 91a, 95a). Accordingly, it is clear that this case raises issues of exceptional importance. Petitioners believe, further, that there are other independent considerations which favor granting the writ.

First, title VI of the Civil Rights Act of 1964 is applicable to all educational institutions which receive federal funds. Virtually every junior college, college, and university in the United States is affected by HEW's title VI enforcement policies and procedures, because their teachers or professors receive grants from the federal government, because their students receive federal scholarships, grants, or loans, or because the schools themselves directly administer federal programs in research or teaching. Thus, all institutions of higher education and many students at those institutions are in peril of losing crucial federal financial support simply because HEW illegally refuses to promulgate the standards (clearly required by 42 U.S.C. § 2000d-1 (1970)) by which such institutions may ensure their compliance with title VI.

Many state governments are, moreover, being coerced by respondents to devise and implement statewide plans for their public institutions without any meaningful guidance about what the federal government requires.[29] All such states are threatened with the loss of significant revenue if the plans and actions taken to implement them do not conform to unwritten, unarticulated, inconsistent, and ever-changing standards which exist only in the minds of certain federal bureaucrats. The district court found, on the basis of substantial evidence, that respondents not only refuse to establish regulations of general applicability or even to provide to the states coherent informal guidelines for determining compliance, but refuse to specify which programs they feel are discriminatory. The national interest requires that HEW's procedures in this area be carefully considered by this Court at the earliest possible date.[30]

Other state governments feel as strongly about respondents' title VI enforcement activities in the area of public higher education. Thus the Attorneys General of thirty-four other states and commonwealths signed amici curiae briefs supporting petitioners in the court of appeals. The concern of other state governments is

[29] HEW's Revised Criteria Specifying the Ingredients Of Acceptable Plans to Desegregate State Systems of Public Higher Education, 42 Fed. Reg. 6658-66 (1978), merely reiterate respondents' hopelessly inconsistent stance that predominantly black institutions should be "enhanced" but "racial identifiability" eliminated. In any event, these criteria only provide guidance for the "guilty"; they do not address how one determines title VI compliance.

[30] The district court's opinion gave another reason why this case is of national interest. The court noted that "at least an inference could be drawn that HEW was attempting, not merely desegregation of the Maryland systems, but to place Maryland in the position of being the guinea pig for HEW's compliance efforts," which would in itself violate title VI. 411 F. Supp. at 559 n.35 (A. 33a n.35). *See* 42 U.S.C. § 2000d-6 (1970).

clear evidence that this case is of national importance and deserves consideration by this Court.

Second, the amount of funds involved in HEW's proceedings against the public institutions of higher education in the State of Maryland is enormous. As the district court noted in its opinion, public institutions of higher education in Maryland receive from HEW approximately sixty-five million dollars in federal funds annually. 411 F. Supp. at 559 (A. 34a). Those funds support a wide variety of programs, from financial aid to minority students, to varied research projects, to medical and health care programs, including the unique lymphatic cancer research and treatment center in the United States. Many if not all of those programs would cease if federal funds distributed through HEW were stopped. 411 F. Supp. at 560-61 (A. 35a-37a). The various institutions themselves would suffer severe consequences from the loss of federal funds. Many tenured professors receive some or all of their salary from federal sources. Many students would not be able to matriculate and pay tuition without federal grants or loans. As Dr. Andrew Billingsley, President of Morgan State University, stated, four million dollars of that school's sixteen million dollar budget was derived from federal funds, and without them, "[i]t would destroy Morgan University and the other black colleges in the State." 411 F. Supp. at 560 (A. 35a). Few, if any, public institutions of higher education could survive a denial of federal funds.

For fiscal year 1976, the State of Maryland expended two million three hundred thousand dollars to implement its 1974 plan to assure the elimination of any segregation in public institutions of higher education in the State. That amount has increased to over four million three hundred fifty thousand dollars for fiscal year 1979. As the district court stated in its opinion:

> [Much of those sums] could be preserved if HEW were to supply some specificity of discriminatory programs. Furthermore, like ripples on a pond, impending loss of up to $65,000,000 seriously disrupts the State's financial condition. Unable to determine whether all, or only some, of the federal funds will be lost, the State's ability to properly budget and appropriate are severely impaired.

411 F. Supp. at 561 (A. 38a).

It is obvious that other states, in order to satisfy HEW, are also expending enormous amounts of money to meet uncertain and shifting standards. Thus, the amount at issue in this case provides additional justification for granting this petition.

Third, respondents refuse to confront the question of whether or not they will permit predominantly black colleges to continue to exist. The district court noted, and both sides recognized, that this issue poses an enormous problem. On one hand, black colleges are seen as positive influences toward social equality.[31] On

[31] In Adams v. Richardson, 480 F.2d 1159, 1165 (D.C. Cir. 1973), the court noted: "As amicus points out, these Black institutions currently fulfill a crucial need and will continue to play an important role in Black higher education."

The district court in this case heard direct testimony on this point. Dr. Andrew Billingsley, President of Morgan State University and author of *Black Families in White America*, talked on cross-examination about the role of predominantly black institutions:

> Institutions differ in their characteristics, in their culture and in the effectiveness at working with certain kinds of students and having certain effects and results.
>
> It happens that blacks are grossly under-represented in colleges. They constitute about sixteen percent of the college age population but only about eight percent of the college going population and while most of those are enrolled in predominantly white institutions, it happens that most of those that graduate, graduate from predominantly black institutions. So these institutions are very effective in educating particularly black youngsters who have had difficult backgrounds before they came to college.

the other hand, HEW's extreme reliance on statistics seems to have caused these schools to be branded by HEW bureaucrats as "racially identifiable" and therefore outlawed by title VI. This practice apparently reflects the implementation by HEW of another unwritten policy, a policy which could not even be articulated by respondents' counsel. 411 F. Supp. at 553 (A. 21a). Although respondents have refused to take any position on the permissibility of the existence of predominantly black institutions, their internal memoranda (disclosed only after a strenuously resisted court order) demonstrate their secret view that these institutions must quickly be made majority white. 411 F. Supp. at 553 n.24 (A. 21a n.24).

This petition presents to the Court the question of whether respondents may defy the provisions of title VI by refusing to adopt regulations applicable to higher education, by refusing to concentrate on discrimination in particular programs of federal financial assistance, and by refusing to apply uniform regulations to alleged discrimination without regard to a history of racial segregation. In this defiance, respondents' actions threaten the abolition of the predominantly black institutions under an unofficial, unexplained, and inexplicable theory of "eliminating racial identifiability." Petitioners urge that this question of the limits of federal bureaucratic authority would best be decided by the Court at this time.

Finally, this litigation does not raise the issue of discrimination by public institutions of higher education in Maryland.[32] The only issues raised relate to whether respondents acted illegally in initiating administrative enforcement proceedings against the institutions. Title VI prohibits discrimination in programs of

[32] Petitioners submit, however, that the record demonstrates both an absence of discrimination and full compliance with title VI.

federal financial assistance. Respondents have admittedly refused to examine programs. Title VI requires federal agencies to adopt regulations of general applicability which would take into account the varying purposes of federal financial assistance.[33] Respondents have admittedly refused to adopt regulations applicable to institutions of higher education. Title VI requires that federal agencies engage in good faith efforts at voluntary compliance. Respondents have acted arbitrarily, whimsically, vindictively, and in bad faith. Instead of obeying the statute, respondents have attempted to govern higher education in Maryland and to completely restructure many of its institutions.

The allegation and proof that HEW acted *ultra vires* in ignoring the dictates of title VI in administering it with respect to the public institutions of higher education in the State of Maryland raises a question of exceptional importance to a federal system of government. No federal official should be permitted to ignore the law's limitations on his authority so that he might impose his views of justice on the states and their citizens. In so acting, he disregards the will of Congress and the powers reserved to the states by the Constitution.

For courts to determine, as they have in this case, that federal officials have acted "in contravention of Title VI," and have treated a state and its public institutions "arbitrarily," "whimsically," and "vindictively" (411 F. Supp. at 563-64 (A. 42a)) is indicative of

[33] As members of this Court recently observed in Regents of the University of California v. Bakke, 46 U.S.L.W. 4896, 4915 (U.S., June 28, 1978) (Justices Brennan, White, Marshall, and Blackmun concurring and dissenting), Attorney General Robert F. Kennedy testified that regulations were not written into title VI itself "because the rules and regulations defining discrimination might differ from one program to another so that the term would assume different meanings in different contexts."

an enormous strain in the whole federal-state relationship. In this unfortunate posture, the courts, and particularly this Court, should reestablish the proper balance. Thus, the current case raises the most serious of questions, going to the central principle of our system of government.

Title 28, United States Code, Section 1254(1) authorizes this Court to allow review "By writ of certiorari granted upon the petition of *any* party to any civil . . . case, before or after rendition of judgment or decree" (emphasis added). Petitioners urge that even though they now have prevailed in the court of appeals, it is appropriate to grant this petition for certiorari.

CONCLUSION

Petitioners believe that the order of the district court is proper in all respects. Nevertheless, in their own right and on behalf of all others affected by title VI nationally — not only the other thousands of recipients but the millions of intended beneficiaries of the myriad federal statutory aid programs: taxpayers, cancer patients, the ill and indigent dependent on medicare and medicaid, students of all races, and particularly minority group members — petitioners seek review in this case.

Petitioners' hope is not merely that the order of the district court will be affirmed. Indeed, their chief interest is not to achieve victory but to establish justice.[34] Thus, whatever the decision by this Court if certiorari is granted, petitioners and those whose interests they represent in filing this petition will be well served.

[34] *See* Brady v. Maryland, 373 U.S. 83, 85 n.2 (1963).

For these reasons, a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-86

BLAIR LEE III, ACTING GOVERNOR OF THE STATE OF MARYLAND, ET AL.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
AN AGENCY OF THE UNITED STATES, ET AL.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Opinion filed March 8, 1976, as amended March 25, 1976 (Mandel v. United States Department of Health, Education and Welfare, 411 F. Supp. 542 (D. Md. 1976))

United States District Court for the District of Maryland

Civil Action No. N-76-1

Marvin Mandel, Governor of the State of Maryland; State of Maryland; Maryland State Board for Community Colleges, an agency of the State of

Maryland; Maryland Council for Higher Education, an agency of the State of Maryland; Board of Trustees of Morgan State University, an agency of the State of Maryland; Board of Trustees of St. Mary's College of Maryland, an agency of the State of Maryland; Board of Trustees of the State Colleges of Maryland, an agency of the State of Maryland; The University of Maryland, an agency of the State of Maryland; Board of Trustees of the Community College of Baltimore, an agency of the Mayor and City Council of Baltimore, on behalf of itself and all other Public Junior and Community Colleges of the various political subdivisions lying within the State of Maryland

v.

United States Department of Health, Education and Welfare, an agency of the United States of America; F. David Mathews, individually and in his offficial capacity as Secretary of the United States Department of Health, Education, and Welfare; Martin H. Gerry, individually and in his official capacity as Acting Director of the Office for Civil Rights of the United States Department of Health, Education, and Welfare; Dewey E. Dodds, individually and in his official capacity as Acting Deputy Director of the Office for Civil Rights of the United States Department of Health, Education and Welfare; Roy McKinney, individually and in his official capacity as Acting Director of the Higher Education Division of the Office for Civil Rights of the United States Department of Health, Education, and Welfare; Burton Taylor, individually and in his official capacity as Chief of the Program and Policy Branch of the Higher Education Division of the Office for Civil Rights of the United States Department of Health, Education, and Welfare; St. John Barrett, individually and in his official capacity as Acting General Counsel of the United States Department of Health, Education, and Welfare; and Ronald Gilliam, individually and in his official capacity as Acting Regional Civil Rights Director for Region III of the Office for Civil Rights of the United States Department of Health, Education, and Welfare.

Civil Action No. N-76-23

Mayor and City Council of Baltimore, a municipal corporation; Board of School Commissioners of Baltimore City

v.

F. David Mathews, individually and as Secretary of the United States Department of Health, Education, and Welfare; Martin H. Gerry, individually and as Acting Director, Office of Civil Rights United States Department of Health, Education and Welfare; United States Department of Health, Education and Welfare, an agency of the United States of America; and Irvin N. Hackerman, individually and as Administrative Law Judge United States Department of Health, Education and Welfare.

NORTHROP, Chief Judge

INTRODUCTION

These two separate actions were instituted by the plaintiffs, Marvin Mandel, Governor of Maryland, various State agencies, and educational institutions (in Civil Action No. N-76-1) and the Mayor and City Council of Baltimore and the Board of School Commissioners of Baltimore City (in Civil Action No. N-76-23) against the defendants, the Department of Health, Education and Welfare [hereinafter, HEW] and certain of its principal officers.[1] Plaintiffs seek issuance of preliminary injunctions to enjoin the defendants from pursuing further agency enforcement proceedings against plaintiffs pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (1970), until defendants have fully complied with the mandates of the Act. Defendants counter that they have thoroughly complied with Title VI and also that issuance of injunction by this Court is barred at this time by two judicial doctrines: (1) exhaustion of administrative remedies, and (2) sovereign immunity.

[1] Due to the similarity of these cases, with resolution turning on identical legal issues and interpretation of the same statute, this Court will consider both herein, rather than rendering two duplicative decisions.

Title VI, 42 U.S.C. § 2000d (1970) provides, as a broad policy, that no program or activity receiving federal funds shall be operated discriminatively:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The State of Maryland receives approximately $65,000,000 presently from the Federal Government for operation of its institutions of higher education and many of the programs offered therein; the City of Baltimore receives approximately $23,000,000 from the Federal Government earmarked for its elementary and secondary schools. Defendants, after reviewing Maryland's institutions of higher education and the Baltimore City School System, concluded that each operated in violation of § 2000d in that vestiges of racial duality remained in the systems. Consequently, defendants initiated agency enforcement proceedings[2] against the City and further ordered a deferral[3] of all new federal financial assistance to the City. In Maryland's case, only issuance of a Temporary Restraining Order by this Court prevented defendants' initiation of similar enforcement proceedings and deferral against the State.

However, when Congress enacted the Civil Rights Act of 1964, it set forth in 42 U.S.C. § 2000d-1 (1970) elaborate guidelines governing the entire administrative process from initial agency contact with a recipient of federal funds to eventual fund cut-off:

[2] The administrative enforcement process is a system of administrative and judicial review, whereby, if discrimination is found to exist, cut-off of *all* federal assistance to the discriminating program or system is ordered.

[3] Deferral of federal funds operates to immediately block any supplemental or new funds to existing programs or the establishment of new programs; the funds granted prior to deferral are unaffected by deferral and will continue at the same level even during deferral.

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Herein lies the issue in controversy — did HEW comply with the statutory prerequisites of § 2000d-1, and if not, do the defenses asserted by defendants, *infra*, bar injunctive relief to compel compliance?[4]

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Before a plaintiff may successfully invoke the court's injunctive powers, the case must have reached a posture in which judicial intervention would be appropriate and effective. It is well-established that where an administrative procedure is statutorily prescribed, a plaintiff must exhaust all available administrative remedies before the court can properly review the matter. *See generally*, 3 K. Davis, *Administrative Law Treatise* § 20.01 et seq. (1958 ed., 1965 Supp.); L. Jaffe, *Judicial Control of Administrative Action* 424-58 (1965). In *Myers v. Bethlehem Shipbuilding Corporation*, 303 U.S. 41, 50-51, 58 S. Ct. 459, 463, 82 L. Ed. 638, 644 (1938) the Supreme Court recognized and reaffirmed "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

Of course, like most judicial doctrine, exhaustion of administrative remedy is not absolute, but is subject to numerous exceptions.[5] Plaintiffs assert that two such

[4] Considerable publicity and emotion have been generated by these cases. Lest there be confusion, this Court wants to dispel any notions that this decision involves review of the desegregation efforts of either the State or the City. There will be absolutely no review of desegregation attempts or plans, no judicial usurpation of local educational functions, or no court-ordered bussing of children for desegregation purposes. This decision deals solely with a review of HEW's compliance or non-compliance with § 2000d—1 of Title VI.

[5] *See United States v. Feaster*, 410 F.2d 1354 (5th Cir.), *cert. denied*, 396 U.S. 962, 90 S. Ct. 427, 24 L. Ed. 2d 426 (1969), which comprehensively described three of the exceptions to the doctrine: (1) where there would be international repercussions resulting from the administrative proceedings, *citing*

exceptions to the exhaustion requirement obtain herein, thereby allowing this Court to order the relief applicable. The first, and foremost exhaustion exception, was fashioned by the Supreme Court, in *Leedom v. Kyne*, 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210 (1958). There, the Supreme Court permitted review of the NLRB's certification of a "bargaining unit" which included both professional and non-professional employees where the professional employees had not consented to the non-professional inclusion as expressly mandated by 29 U.S.C. § 159(b)(1) (1970). In fact, in direct contravention of Congressional provision, the NLRB arbitrarily refused to permit the professionals to vote for or against the inclusion. Upon this factual context, the Supreme Court rejected the agency's contention that the district court lacked jurisdiction and concluded that the district court in that instance had original jurisdiction:

> This suit is not one to "review," in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act. * * * Plainly, this was an attempted exercise of power that had been specifically withheld. It deprived the professional employees of a "right" assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given.

Id. at 188-89, 79 S. Ct. at 184, 3 L. Ed. 2d at 214. The Court stated further:

> Here, differently from the Switchmen's case, "absence of jurisdiction of the federal courts" would mean "a sacrifice or obliteration of a right

McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 83 S. Ct. 671, 9 L. Ed. 2d 547 (1963); (2) where a substantial violation to a plaintiff's constitutional rights has been shown, *citing*, *Fay v. Douds*, 172 F.2d 720 (2nd Cir. 1949); and, (3) where an agency acted in "brazen" defiance of its statutory authorization, *citing*, *Leedom v. Kyne*, 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210 (1958).

> which Congress" has given professional employees, for there is no other means, within their control to protect and enforce that right. And "the inference [is] strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control." This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers.
>
> Where, as here, Congress has given a "right" to the professional employees it must be held that it intended that right to be enforced, and "the courts * * * encounter no difficulty in fulfilling its purpose."
>
> The Court of Appeals was right in holding, in the circumstances of this case, that the District Court had jurisdiction of this suit, and its judgment is affirmed.

Id. at 190-91, 79 S. Ct. at 185, 3 L. Ed. 2d at 215 [citations omitted].

Consequently, for the instant cases to fall within the purview of the *Leedom* exception (and the cases interpreting *Leedom*)[6] it must be proven that the agency acted clearly outside the provisions of Title VI.

The second exception to the exhaustion doctrine cited by plaintiffs derives principally from *Jewel Companies, Inc. v. FTC*, 432 F.2d 1155 (7th Cir. 1970). In *Jewel*, the United States Court of Appeals for the Seventh Circuit provided for district court review prior to an administrative hearing where the hearing and post administrative judicial review based on the record of that hearing would be inadequate to test inherent legal questions. The Court stated:

> If the question of the Commissioner's obligation is postponed until final appeal of a Commission order, the standard of review will be different. At

[6] *See e.g., American General Insurance Co. v. FTC*, 496 F.2d 197, 200 (5th Cir. 1974); *Pepsico. Inc. v. FTC*, 472 F.2d 179, 187 (2nd Cir. 1972); *Lee County School District Number 1 v. Gardner*, 263 F. Supp. 26, 31 (D.S.C. 1967).

> that point the court of appeals would only decide whether the final order is supported by the evidence and would not question the authority of the Commission in issuing the complaint. As in Skinner & Eddy, [249 U.S. 557, 39 S. Ct. 375, 63 L. Ed. 772 (1919)] 'the so-called administrative remedy was without relevance to the plaintiff's claim.' The legal obligation of a Commissioner can be determined by the courts without delay and we think the proper approach is to allow such inherently legal attacks prior to an agency's final order.

Id. at 1159 [citations omitted]. *See* L. Jaffe, *Judicial Control of Administrative Action* 428 (1965). This rationale represents sound recognition that due process requirements and fundamental fairness would allow district court examination prior to what could be a long and necessarily ineffective agency process.

Consequently, in addition to the *Leedom* exception, if the questions presented herein involve matters not properly to be considered by the agency process, then this Court may intervene under the rationale of *Jewel.* We now look to the facts in both cases to determine whether each does or does not come within either exception.

Plaintiffs in both cases forcefully assert that the defendants unquestionably failed to comply with the express provisions of 42 U.S.C. § 2000d-1, thereby bringing into play the *Leedom* exception to the exhaustion of administrative remedies doctrine. Plaintiffs bottom this on two allegations: that defendants have totally refused to specify which "programs" in their systems are operated discriminatively in disregard of Title VI; and, that defendants did not in good faith, attempt to secure compliance by voluntary means as a prerequisite to initiating the agency hearing process.

Voluntary Compliance

Title VI, as a prerequisite to initiation of the administrative process, compels an agency to secure

compliance by voluntary means if possible.[7] In pertinent part, Title VI mandates that:

> [N]o such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. . . .

42 U.S.C. § 2000d-1 (1970).

Doubtless, since the Act was in no way intended to be punitive or vindictive,[8] this provision compelling negotiation must be interpreted to further require that the agency pursue such compliance with good faith. The issue, therefore, narrows to whether HEW sought to achieve, in good faith, compliance by voluntary means.

The State of Maryland

The first contact between the State of Maryland and the defendant, the Department of Health, Education and Welfare (and its Office of Civil Rights [hereinafter, OCR]) concerning implementation of the Civil Rights Act, Title VI, within the State, occurred early in 1969. (See Exh. 4 to Complaint, letter, March 12, 1969, Civil Action No. N-76-1). Negotiations thereafter began amicably, and on October 1, 1969, Maryland submitted its first plan to assure elimination of segregation. (Exh. 4 to Complaint, Civil Action No. N-76-1). HEW reviewed

[7] In the Senate debates on the Civil Rights Act of 1964, Senator Humphrey, a sponsor of the Act, indicated that the agency was to end discrimination by any voluntary means and exhaust all avenues of cooperation before obtaining a fund cut-off:

> [the] purpose of title VI is not to cut-off funds, but to end racial discrimination. . . . In general, cutoff of funds would not be consistent with the objectives of the Federal assistance statutes if there are available other effective means of ending discrimination. . . .

110 Cong. Rec. 6544 (1964).

[8] *See* 110 Cong. Rec. 7059 (1964) (remarks of Senator Pastore.)

and, on January 30, 1970, rejected the plan, indicating that there were certain inherent "limitations" which precluded acceptance of the plan.[9] Subsequently, Maryland revised the original plan and submitted, on December 1, 1970, a second, more comprehensive plan with statewide emphasis as requested by the defendants.[10] For over two and one-half years no formal acceptance or rejection was registered by defendants. Consequently, the State implemented the plan in the belief that it was acceptable. It was not until 1973, after Maryland had expended considerable resources in effectuating the plan, that defendants reviewed the 1970 plan and rejected it,[11] apparently due to prodding from Judge Pratt of the United States District Court for the District of Columbia.[12]

Thereafter, relations became increasingly strained between the parties, but nevertheless, negotiations

[9] Though HEW complimented the State for its overall efforts to improve its system, HEW found the plan's school-by-school approach lacking and suggested that rather than aim their efforts at individual institutions, plaintiffs should take a statewide approach. *See* Exh. 5 to Complaint, Civil Action No. N-76-1.

[10] *See* Exh. 7 to Complaint, Civil Actions No. N-76-1. At this time there continued to be a good faith spirit of cooperation between the parties. At the hearing in this Court of February 2, 1976, Lieutenant Governor Blair Lee testified concerning that plan:

> [W]e tried our hand at a second plan, again working with Dr. Severinson and the other people from the Department and the second version attempted to make it more systemwide, I think, and to really sort of flesh out and make more specific the content of the original plan and that — and, again, they were looking over our shoulder pretty much all the way and that was submitted to the Department I believe on December 1st, 1970.

Tr. at 363.

[11] *See* Exh. 11 to Complaint letter, May 21, 1973, Civil Action No. N-76-1.

[12] *See Adams v. Richardson,* 356 F. Supp. 92 (D.D.C. 1972), wherein HEW was ordered to assume a more active role in enforcing Title VI in certain states, including Maryland.

continued.[13] On February 5, 1974, Maryland presented HEW with what was to become its final desegregation plan to date. (Exh. 20 to Complaint, Civil Action No. N-76-1). On June 21, 1974, HEW, by "Mailgram," accepted the plan without reservation[14] and Maryland immediately began implementation under the aegis of the defendants. Until August 7, 1975, implementation of the plan proceeded unabated.[15] On that day, in what has been characterized as a "terrible letter,"[16] Dewey Dodds, Regional Director of OCR accused the State of failing "to implement, or [to] have only partially fulfilled most of the commitments made in the State plan." (Exh. 34 to Complaint, at 2, Civil Action No. N-76-1) The letter also presented seven pages of demands which were to be accomplished in an apparently unreasonable period of time.[17]

[13] At this juncture it must be noted that, as to be described later, Maryland repeatedly sought information in regard to what Maryland should do to submit an acceptable plan. *See e.g.*, Exh. 12 to Complaint, letter from Governor Marvin Mandel, May 30, 1973, Civil Action No. N-76-1.

[14] *See* Exh. 25 to Complaint, Civil Action No. N-76-1. Mr. Peter Holmes, the Director of the Office of Civil Rights, forthrightly assured that "there [was] no qualification of the acceptance of the Plan." Deposition, Peter E. Holmes, at 120.

[15] There were, however, certain noteworthy activities in this period which need to be mentioned. First, on December 11, 1974, defendants sent a letter to plaintiffs propounding a vast array of questions again questioning the plan. (Exh. 28 to Complaint, Civil Action No. N-76-1). Plaintiffs contend that this represented a renewed attack on the plan and that it constituted a de facto revocation of the prior approval. Also, during that period, Maryland submitted its first annual report (Exh. 29 to Complaint, Civil Action No. N-76-1) and the first mid-year status report (Exh. 33 to Complaint, Civil Action No. N-76-1) detailing the progress obtained under the plan.

[16] Lieutenant Governor Lee, at the January 1976 hearing, indicated that this letter directed to the Governor of Maryland was a "terrible letter" (Tr. at 370) that employed the most "peremptory kind of language" possible (Tr. at 371).

[17] Certain of the times specified were so outrageous that this Court fails to understand how the defendants could have realistically expected they be accomplished. For exaxple, the letter provided 60 days for reform and implementation of the financial aid program in the State. What HEW obviously neglected to consider was that the State, as well as devising and preparing a new system, would have had to obtain approbation from the State Legislature which was not in session during any part of the 60-day period — an action close to impossible.

Governor Mandel, in a letter of August 13, 1975, rejected out-of-hand the accusations contained in the letter of August 7th and labelled the communication "a clumsy effort at intimidation" which must be "Viewed as a unilateral repudiation by the Office for Civil Rights of the Plan itself and of OCR's approval of it a year ago." (Exh. 35 to Complaint at 1, Civil Action No. N-76-1). Subsequently, this matter came to the attention of David Mathews, Secretary of the Department of Health, Education and Welfare, who, concerned about the precipitous nature of the August 7th letter, contacted Lt. Governor Lee to "get the show back on the road."[18] That conversation resulted in two meetings between Maryland officials and HEW personnel. At the first, held in mid-September with Lt. Governor Lee and Colonel Mann, Special Assistant to Secretary Mathews, in attendance, the "arbitrary and irrational demands" of the August 7th letter were discussed (Tr. at 374). There, Colonel Mann "agreed with [Lt. Governor Lee] as to the tone of the letter, that it was totally inappropriate. . . ." (*Id.*) On September 24, 1975, there was a second, larger meeting, attended by Lt. Governor Lee, Colonel Mann, Peter Holmes (Director of OCR), Dr. Sheldon Knorr (Executive Director of the Maryland Council for Higher Education), and a number of special assistants to Secretary Mathews. Lt. Governor Lee described this meeting as follows:

> [T]he main thrust of the meeting was aimed at carrying out Secretary Mathews' original idea of getting the show back on the road which would consist of a meeting of the minds between the two principals, the Department and the State, as to

[18] Testimony of Lieutenant Governor Lee, Tr. at 373.

> priorities and really what they wanted of us and the extent to which we could comply and when. . . . [T]hey were — seemed entirely willing to withdraw the August 7th letter, at least Colonel Mann and some of the others were.
>
> Mr. Barrett, the attorney, with one eye very obviously on the Adams case suggested that it not be a withdrawal for fear of feeding ammunition to the Plaintiffs in that case and so we all agreed that the August 7th letter should be held in abeyance and it was agreed that there would be another meeting at staff level to get things going again.

Tr. at 376.

To those in attendance at this meeting, it was apparent that voluntary compliance efforts unquestionably had been reinstituted in earnest and that negotiations would resume in full.[19] Shortly thereafter, Peter Holmes, acknowledging the matters agreed upon at the meeting, informed plaintiffs that the Department would hold in abeyance the time frames set forth in the August 7th letter for accomplishing specific steps in the plan. (Deposition, Holmes, at 161).

According to the hearing testimony, for a brief period optimism reigned in the State, and it was believed that the defendants actually wanted to pursue voluntary compliance. On October 1, 1975, Dr. Knorr and other representatives of the Maryland Council for Higher Education met with HEW's employees in Philadelphia to resolve any areas of disagreement. There, plaintiffs

[19] Dr. Knorr's recollection of the meeting was similar to Lt. Governor Lee's:

> We talked about in general how we could proceed from that point forward to work together toward implementing the plan in a voluntary way and I might say that that meeting was the only positive point in my involvement in this whole process beginning July 1, that I left that meeting with an understanding that *we were finally on the right track, that we were going to get an understanding of what we had been doing and where we were going to go from that point.*

Tr. at 316 [emphasis added].

were left with the impression that "the ball was in HEW's court" (Tr. at 378) and that HEW was to communicate with the State further. As Dr. Knorr observed:

> My understanding at least was that they were going to take under advisement all that we had provided, consider the process that I had talked about in terms of priority, and a last item in the meeting was we'll be back in touch.
>
> You know, we expected subsequently to hear something from OCR in this regard. . . .
>
> . . . The next move was up to OCR and it was a clear understanding that they were going to contact us.

Tr. at 323-24.

Not until December 15, 1975, when the State received a startling letter from Martin Gerry, the new Acting Director of OCR, did Maryland receive any formal communication from the defendants. This letter did not offer guidance as the State had been expecting, but rather informed Governor Mandel that Maryland had "failed to implement or have only partially fulfilled most of the commitments made in the State Plan." (Exh. 36 to Complaint, Civil Action No. N-76-1). The communication from Gerry concluded that agency enforcement proceedings were to be implemented:

> Based on a review of the total record, as the responsible Department official, I have determined pursuant to Section 80.8(c)(1) of the Department's Regulation that the State of Maryland, its agencies and its state-operated institutions of higher education are not operating in compliance with Title VI of the Civil Rights Act of 1964, and OCR has exhausted the possibilities of compliance through informal conferences and other voluntary means. Therefore, I have referred this matter to the Department's Office of General Counsel and requested that it initiate formal administrative enforcement proceedings against the State of Maryland.

Exh. 36 to Complaint, at 3, Civil Action No. N-76-1. Additionally, the defendants were not satisfied by merely informing the State of this decision, but called a press conference to announce what was described as the "Consistent failure of the State's higher education institutions to comply with the provisions of a Statewide desegregation plan accepted by [the] Department in June, 1974. . . ." (Exh. 37 to Complaint, at 2, Civil Action No. N-76-1).

The foregoing chronology raises serious doubts concerning whether the defendants sought, in good faith, compliance by voluntary means. The record is somewhat curious in that HEW, rather than negotiating compliance, seemingly *chose to foreclose* voluntary compliance by precipitously casting the negotiations into what is, in effect, an adversary proceeding.

Before this Court is willing, however, to draw further conclusions from the events, it must consider another important aspect of the voluntariness issue — plaintiffs' assertion that defendants consistently refused to specify the steps necessary to obtain voluntary compliance.

Plaintiffs contend that defendants have never specified, and in fact, have consistently refused to specify, actions which plaintiffs could take in order to facilitate compliance with Title VI. The records bears witness to the absolute dearth of definitive standards provided by defendants, as well as the numerous requests for guidance by the plaintiffs. As early at 1970, the State, without apparent success, sought to determine what basis HEW employed to evaluate the State's system and how specifically it could comply with Title VI. (Exh. 6 to Complaint, Civil Action No. N-76-1). This was described by Lt. Governor Lee, at the January 30 hearing:

> When this whole matter first started, when the first letter came in March of 1969, there was absolutely no problem, no conflict of thoughts and ideas and desires as far as the State of Maryland is concerned, and this is not a backward state or a red neck state.
>
> It was our desire to comply with Title VI in every way, in every way that made sense, as long as it didn't involve literally destroying our higher education system.
>
> And we have been, from the beginning, anxious to do what we conceive Title VI to be all about and we had worked very closely with Dr. Severinson toward that end. . . . But then began this incredible *zig zag course*, this pursuit of a moving target, sometimes an almost invisible target, where the Department simply wouldn't tell us what they wanted or wouldn't tell us in words that could be translated into a plan in the real world and their erratic changes of course and changes of pace, of speed, made it very difficult for the State.

Tr. at 387-88 [emphasis added].[20]

This "zig zag" course, as described by the Lieutenant Governor, permeates the entire record of the defendants' dealings with Maryland. At most, in response to

[20] Governor Mandel also observed this problem:

> Beyond that [the general prohibition against discrimination in Title VI], the Federal Courts and HEW have done no more than make vague references to "dismantling" the former dual systems and "eliminating racial identifiability" of the institutions.
>
> . . . We are willing to make reasonable amendments to our plan subject to firm information as to the ultimate target.

Exh. 12 to Complaint. See also Exh. 22 to Complaint, letter, Wesley Dorn, Chairman, Governor's Task Force, Civil Action No. N-76-1.

Dr. Day, Vice Chancellor for Academic Planning and Policy at the University of Maryland also recognized the problems:

> I didn't have the foggiest idea what kind of checkpoints to place so [the Task Force] just did what we thought was right in conscience and law . . . .
>
> We didn't get any help from HEW.
>
> * * * * * *
>
> No, sir [we never knew what HEW expected]. Still don't.

Tr. at 266-67, 277.

plaintiffs' queries, defendants made only sweeping generalizations concerning what they sought. Typically, when asked for specifics, defendants often responded with broad sweeping phrases, such as, eliminate all vestiges of racial duality or eliminate all racial identifiability, but gave no specifics on how this was to be accomplished.[21]

Moreover, much of the State's confusion derived from HEW's perplexing and conflicting use of statistics. Lieutenant Governor Lee testified to the defendants' contradictory application of statistics:

> There was a continuing absence of firmness as to the significance of the numbers. Whenever the Department made a Complaint that the State was not doing right, in their eyes, they seemed to base it on the numbers, on the racial composition in the several institutions. But if you ask them whether the numbers were important, they would say no. . . . And then we would ask them how do you measure the results of the process that they were so interested in, aimed at eliminating racial identifiability, and they'd say — then you'd come back to the numbers, the only way you can measure the success, the result, the only way you can quantify the success is by looking at the numbers, the racial composition. But the numbers, mind you, are not important. . . .

Tr. at 366-67.

Evidenced throughout the entire course of dealings are myraid examples of defendants' duplicitous posture in regard to statistics. While repeatedly denying that

[21] An explanation (if not *the* explantion) for defendants' refusal to supply specifics may be gleaned from a memorandum of November, 1969, written by defendant Gerry to the then director of OCR, wherein Gerry stated:

> [I]t would seem prudent to place the burden for developing a plan on the State. If we make specific suggestions we are as a practical matter stuck with them, whether they "work" or not.

Plaintiffs' Exh. 2, Civil Action No. N-76-1.

their decisions were based on statistics,[22] the defendants nevertheless consistently explicated Maryland's violation of Title VI by citing statistics. For example, Peter Holmes, by letter of May 21, 1973, which informed plaintiffs of the State's violation of Title VI, indicated a marked reliance on statistics:

> In appraising whether vestiges of the dual higher education system remain in Maryland, we have considered first the statistics which you have supplied concerning both faculty and students. . . .
>
> . . .
>
> The present disparities in the racial composition of the faculties and student bodies among the various institutions in the Maryland State system of higher education appear clearly attributable to the existence of the prior dual system based on race. Accordingly, we must conclude that the dual system has not been fully disestablished.

[22] In his deposition of January 20, 1976, defendant Taylor illustrated this in the following exchange:

> I further recall that I informed the staff at that time that while we would welcome receipt of the statistical data, that it was in no way a substitute for the information on the actions and processes to implement the Plan, and that that, the latter information, would be the major focus of our evaluation of the implementation of the Plan.
>
> Q. Do I correctly interpret what you are saying that you told the Maryland Council for Higher Education that a preliminary statistical presentation was not what HEW was looking for? A. Yes, we told them that.

Deposition, Taylor, at 13.

Peter Holmes also, by letter of June 6, 1973 to Governor Mandel, depreciated the value of statistics:

> We have not established specific numerical indices to determine when a dual system of higher education has been disestablished. . . . In addition, since the selection of an institution of higher education is made by individual students, a practice which need not be changed to meet our requirements, it is not possible to project the racial composition of colleges with precision.

Exh. 13 to Complaint, at 3, Civil Action No. N-76-1.

Exh. 11 to Complaint, at 1, 4, Civil Action No. N-76-1. Another striking example is set forth in the December 15, 1975 letter to Governor Mandel from defendant Gerry, wherein defendants couch Maryland's non-compliance almost totally in terms of statistics:

> More serious than Maryland's failure to implement its plan is the segregation which continues to exist at the post secondary institutions throughout the State. The information Maryland provided OCR in the First Annual Desegration Status Report, February 1975, shows that the percentage of black students at the predominantly black colleges in the State system was 86.9 in 1974, while the percentage of black students at the predominantly white senior institutions was 7.4 for the same year. *These figures clearly reveal that the State is continuing to operate a dual system of higher education.*

Exh. 36 to Complaint, at 3, Civil Action No. N-76-1[23] [Emphasis added].

In addition to statistics, defendants left another extremely perplexing problem unresolved — whether institutions with black traditions could be permitted to continue to preserve that identity. Early in the negotiations, Lt. Governor Lee posed this disturbing question:

> Morgan State College is academically superior to many of the predominantly white colleges in HEW's Region III. . . . If you eliminate Morgan's racial identifiability, you also eliminate one of the black community's proudest symbols. Must this be done in the name of extending civil rights?

Exh. 6 to Complaint, at 2, Civil Action No. N-76-1. Unfortunately, defendants did not offer a consistent

[23] While the Court will refrain from passing on the merits of Maryland's compliance, or lack of compliance, we must note the irony of defendants' use of *these* statistics to prove violation of Title VI since there is undisputed testimony that the numbers are "right on track" with the numerical goals established under the plan considered and approved by defendants. Tr. at 249-51, 258 (testimony of Dr. Day).

answer to such queries stating on one hand that "the department . . . has no objection to institutions that were predominantly black in racial composition,"[24] while on the other hand criticizing the State on its failure to "eliminate all vestiges of racial identifiability." Counsel for defendants even recognized the enormous problem posed by this issue. When asked by the Court to comment on the testimony of Dr. Billingsley, President of Morgan State University, that HEW was bent on elimination of predominantly black institutions in Maryland, counsel responded:

> Well, Your Honor, there is no truth to the fact that we are trying to eliminate the black institutions. What we are trying to do is to eliminate the identifiability as black institutions of the black institutions. . . .
>
> . . .
>
> Your Honor, this is a difficult concept and we acknowledge that it's not an easy concept. . . .
>
> It's not an impossible concept though. . . .

Tr. at 154-55.

Dr. Day testified extensively to the irreconcilable problems implicit in effectuating elimination of racial identifiability, while preserving the character of the black institution:

> I was very worried . . . about you might call the arithmetic of the numbers, the inconsistent arithmetic, how you could move black students into the historically white institutions without seriously changing the number of black students in the black colleges.
>
> We didn't get any guidance on that at all. Tr. at 242.

[24] Deposition, Peter Holmes, at 46. Defendants' official position was that black institutions could maintain their unique character, however, within HEW there was much sentiment to "make all colleges majority white quickly" and to "approximate the ratio of black and white students in the State as a whole who attend college." Plaintiffs' Exh. 1, Memorandum of Lloyd R. Henderson, Chief of Education Branch of OCR, Civil Action No. N-76-1.

Confronted with this apparently insurmountable dilemma, defendants offered little concrete support. That which was proffered was rather quizzical:

> I remember one guidance we got from Mr. Taylor at that meeting [on July 24, 1973] was, well, that was a problem [the arithmetic] but maybe the solution was that Maryland would bring a lot of black students in from other states. And that just struck me as unreal. . . . [S]omehow, he didn't understand the issue.

Tr. at 273-74.

Though the foregoing only presents abbreviated examples of defendants' arbitrary behavior, it nevertheless illustrates HEW's obvious refusal to act with good faith and cooperation. Repeatedly, plaintiffs sought specifics as to why they were in violation of Title VI and what could be done to rectify the situation, but their efforts were of no avail. This intentional, systematic behavior of the defendants belies any assertion that they sought compliance in good faith by voluntary means. In fact, this behavior almost completely precluded voluntary compliance since, doubtless, it is nearly impossible to comply with standards that are unknown.

In light of defendants' arbitrary, and somewhat cavalier, behavior, as well as the precipitous termination of negotiations, there is but one conclusion to be drawn — that defendants refused to seek, in good faith, compliance by voluntary means. Consequently, this Court must conclude that defendants' activities stood patently in violation of the prescriptions of Section 2000d-1.

City of Baltimore

Many facets of HEW's conduct in regard to Maryland are applicable to the within consideration of HEW's dealings with Baltimore City. There is one important additional factor, however, that alters Baltimore's

situation somewhat from the State's — a pamphlet published by defendants' Office of Civil Rights which governs HEW's enforcement of Title VI in the elementary and secondary school systems. The pamphlet, entitled *Policies on Elementary and Secondary School Compliance with Title VI of the Civil Rights Act of 1964,* in pertinent part indicates firm policy strictures applicable to Title VI compliance efforts:

> Where review of a school system indicates noncompliance with the Assurance of Compliance and Title VI, the Office for Civil Rights staff *will make every reasonable effort to achieve compliance through negotiation.*
>
> The first formal step of such negotiation is a letter from the Office for Civil Rights to the school system identifying the particular areas of noncompliance, advising the system of its responsibility to prepare and submit to the Office for Civil Rights a plan for correcting the noncompliance promptly and effectively, and offering the school system assistance and guidance on the best manner to achieve compliance. If a school system submits a plan which is unsatisfactory in any respect, the Office for Civil Rights *will inform the school system in detail and in writing of the areas in which the plan is not satisfactory.*
>
> If local officials so request, the Office for Civil Rights will at any stage of negotiation recommend in writing specific steps the school system may take to achieve compliance.

Pamphlet, at ¶22 [Emphasis added].

In view of this forceful policy statement, less than complete cooperation and written specification by defendants in the instant case would be a failure to comply with Title VI. Defendants' actions must comport with the pamphlet for it is a well-established precept that governmental agencies must scrupulously conform to their own rules and authorizing statutes. *Service v. Dulles,* 354 U.S. 363, 77 S. Ct. 1152, 1 L. Ed. 2d 1403 (1957); *United States ex rel. Accardi v.*

Shaughnessy, 347 U.S. 260, 74 S. Ct. 499, 98 L. Ed. 681 (1954); *United States v. Heffner*, 420 F.2d 809 (4th Cir. 1970); *Equal Employment Op. Comm'n. v. Western Electric Co. Inc.*, 382 F. Supp. 787 (D. Md. 1974). As the United States Court of Appeals for the Fourth Circuit stated, in *Heffner:*

> An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down.

420 F.2d at 811.

In 1973, defendants were ordered, in *Adams v. Richardson, supra*, to determine whether there existed violations of Title VI within the Baltimore City school system. After obtaining considerable information from plaintiffs concerning the school system, Peter Holmes, on February 5, 1974, indicated that "further desegregation of Baltimore Schools [was] necessary and feasible" and requested a "plan for further student and faculty desegregation" from plaintiffs. (Exh. A to Complaint, Civil Action No. N-76-23). In June 1974, the City submitted the requested plan, which defendants, by letter of July 29, 1974, declared was in violation of Title VI. Defendants also, by that letter, threatened administrative enforcement action. (Exh. B to Complaint, Civil Action No. N-65-23). Thereafter, plaintiffs submitted a new plan, but that plan also, according to the defendants, did not comport with Title VI and therefore, was on August 23, 1974, rejected. (Exh. D to Complaint, Civil Action No. N-76-23).

The letter of August 23, 1974, has considerable importance to the within examination because it illustrates the emergence of behavior by defendants which must properly be labelled arbitrary. In that letter defendants notified plaintiffs that administrative enforcement proceedings were to be immediately commenced against the City;[25] and that compliance

[25] See Exh. E to Complaint, Civil Action No. N-76-23, Notice of Opportunity for Hearing, September 9, 1974, wherein the process was actually initiated.

could not be effectuated by voluntary means. Then, in an ostensibly contradictory fashion, defendants sought further material from plaintiffs — a "pupil locator map" — which defendants stated would be "a *basis* for considering the feasibility to further remedies to maximize desegregation in [the] system." [Emphasis added]. Moreover, the letter stated further:

> I am merely requiring that you implement your proposed pairings as an interim measure until you provide the information requested in Step (2). *Only then can this Office have a factual basis on which to rationally analyze remedies for further elementary desegregation.*

Id. at 3 [Emphasis added].

This letter reveals the schizophrenic posture being assumed by the defendants. On one hand, defendants were willing to cast this into the long, exhaustive administrative enforcement process, seemingly due to their inability to secure compliance by voluntary means, while on the other hand, defendants sought additional information in order to allow proper analysis of the system. With defendants themselves acknowledging their lack of sufficient basis to fashion a remedy, how could it conceivably be argued that compliance by voluntary means could not be secured? It would appear that only if the plaintiffs refused to provide the sought-after information would it be appropriate to initiate enforcement proceedings prior to resolution of such important underlying issues. But this is not the case here, as even Holmes admitted "[t]he Baltimore School System also [always] indicated a desire to work with the Office for Civil Rights. . . ." (Deposition, Holmes at 43).

Consequently, as early as 1974, HEW disregarded the requisites of Title VI as well as its own policy statement by choosing not to pursue reasonable compliance efforts with the admittedly cooperative City.[26] By initiating

[26] Much of the testimony elicited by plaintiffs at the January 1976 hearing bolstered plaintiffs' contention that

enforcement proceedings at that juncture, defendants prematurely altered the relation of the parties from partners to adversaries, thereby severely diminishing the possibility of voluntary compliance.

Nevertheless, the City thereafter continued to pursue its efforts toward voluntary compliance. In early 1975, plaintiffs submitted proposed desegregation plans for its high schools (Exh. H to Complaint, Civil Action No. N-76-23), faculty (Exh. J to Complaint), and junior high schools (Exh. K to Complaint). Dr. Patterson, then Superintendent of Baltimore City Schools, reiterated the City's desire to work promptly and vigorously "along with defendants to insure the implementation of suitable plans." (Exh. G to Complaint, at 1 Civil Action No. N-76-23). Shortly thereafter, on May 2, 1975, HEW sent plaintiffs a long-awaited evaluation and critique of the plans the plaintiffs had proffered. This evaluation concluded that the plans were not sufficient to satisfy Title VI. (Exh. L to Complaint, Civil Action No. N-76-23). However, defendants chose not to grant the City time to rectify the deficiencies in the plans but immediately established a date for the administrative enforcement hearing to begin and also ordered the "deferral" of funds.[27] To this, the City replied "we regret that Baltimore City was not given the opportunity to respond to your specific concerns before your office sought an administrative hearing," but nevertheless, offered again to meet with defendants to facilitate voluntary compliance. (Exh. M to Complaint, at 1, Civil Action No. N-76-23).

The foregoing graphically evidences repeated disregard of defendants to comply with the letter and spirit of Title VI, as well as its own policy statement. the City sought to cooperate with HEW unhesitantly. *See e.g.*, Tr. at 65, wherein William Schaefer, Mayor of Baltimore, testified: "[s]o I can unequivocally say as far as I am concerned every effort to negotiate and comply is being made and has been made."

[27] See note 3, *supra*.

Defendants knowingly foreclosed viable avenues of negotiation while invoking the enforcement process and ordering deferral, thereby destroying the essence of voluntary negotiation. Furthermore, review of HEW's dealings with the City reveals a cavalier and arbitrary posture by HEW toward plaintiffs' requests for specificity in defining deficiencies and suggesting improvements. Plaintiffs continually sought guidance from HEW. To cite one example, Dr. Patterson in a letter of January 20, 1975, attests to HEW's lack of definitive standards when attempting to explain the City's inability to take "specific measures" to correct deficiencies in their program:

> [W]e hope that you will be willing to describe in detail each deficiency which you believe exists, to explain what you believe must be accomplished to correct each deficiency, and to suggest measures which you believe would work to overcome the asserted deficiencies. Only then will the Board be in a position to respond to your request for "specific measures"; whereas, as matters now stand, the Board is at a loss to understand precisely what measures you feel should be taken to change the plan now in effect for faculty and at the elementary and seventh grade levels.

Exh. G to Complaint, at 2, Civil Action No. N-76-23.[28]

Subsequent to plaintiffs' numerous requests, defendants finally offered the City some indication of deficiencies in its program. (Exh. L to Complaint, letter, May 2, 1975, Civil Action No. N-76-23). But even there, when questioned later as to whether the letter was intended to comprehensively outline the City's violations, HEW replied that it merely "enumerated exam-

[28] There are myriad examples of HEW's failure to offer guidance to the City. Overwhelmingly, at the January 1976 hearing, plaintiffs' witnesses testified to having no idea of what HEW demanded. *See e.g.*, Tr. at 35-36, testimony of Grover McCrea, member of Board of School Commissioners of Baltimore City; Tr. at 47, testimony of Sheila Sachs, also School Board member.

ples of inadequacies" and "was not intended as an enumeration of all possible inadequacies of those plans." (Exh. O to Complaint, at 3, Civil Action No. N-76-23, Response of HEW for Admissions). Hence, since defendants admit that this letter, presented finally to apprise plaintiffs of the City's deficiencies, was in itself inconclusive and incomplete, there is but one conclusion to be drawn — that defendants failed to "inform the school system *in detail and in writing* of the areas in which the plan is not satisfactory." (*See* pamphlet, at ¶22).

Though this decision necessarily outlines only a portion of defendants' activities, this Court notes that there is an abundance of evidence which, taken together, forms a consistent pattern of defendants' duplicitous and uncooperative behavior. Defendants have overwhelmingly refused to negotiate in good faith, afforded scant specificity and guidance to assist the City, and repeatedly declined to pursue voluntary compliance. Rather, defendants have sought to bludgeon compliance through initiation of unwarranted and premature enforcement procedures. This Court must accordingly declare that defendants' actions were in brazen defiance and in direct contravention of Title VI and paragraph 22 of defendants' own policy statement.

PROGRAM-BY-PROGRAM APPROACH

There is much authority for the proposition that Title VI requires HEW to employ a program-by-program analysis when reviewing federally funded institutions. On this point, Title VI specifically states:

> Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to

> the particular political entity or part thereof, or other recipient as to whom such a finding has been made and, *shall be limited in its effect to the particular program, or part thereof,* in which such noncompliance has been so found. . . .

42 U.S.C. § 2000d-1 (1970) [Emphasis added].

The Fifth Circuit in *Board of Public Instruction v. Finch,* 414 F.2d 1068 (1969), considered whether the cited statutory language requires a programmatic approach. The court sharply rejected defendants' non-programmatic argument, that defects in one part of the system automatically infect the whole:

> We note finally that the purpose of the Title VI cutoff is best effectuated by separate consideration of the use or intended use of federal funds under each grant statute. If the funds provided by the grant are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment, then termination of such funds is proper. But there will also be cases from time to time where a particular program, within a state, within a county, within a district, even within a school (in short, within a "political entity or part thereof"), is effectively insulated from otherwise unlawful activities. Congress did not intend that such a program suffer for the sins of others. HEW was denied the right to condemn programs by association. The statute prescribes a policy of disassociation of programs in the fact finding process. Each must be considered on its own merits to determine whether or not it is in compliance with the Act. In this way the Act is shielded from a vindictive application. Schools and programs are not condemned enmasse or in gross, with the good and the bad condemned together, but the termination power reaches only those programs which would utilize federal money for unconstitutional ends. Under this procedure each program receives its own "day in court."

Id. at 1078.

The legislative history of Title VI supports this reading.[29] A whole system is not to be considered infected by a violation of one of its components, for as Senator Pastore stated during Senate debate:

> Once the policy is set, there are many, many ways in which intervention could be had, so as not to do an injustice to a great multitude because of the instance of only one offender.
>
> We ought to make that very clear in the history we are making here today. We are not seeking to penalize people by way of pressure and saying that we can cure this one case if we twist the arms of 99 people. That is not the purpose of the section. We are not trying to bring compliance through pressure. We are trying to bring voluntary compliance.

110 Cong. Rec. 7061 (1964).

[29] Senator Humphrey, speaking for the bill, stated:

> Some Senators have expressed the fear that in its original form Title VI would authorize cutting off of all federal funds going to a state or a particular program even though only one part of the state were guilty of racial discrimination in that program. And some Senators have feared that the title would authorize cancelling all federal assistance to a state if it were discriminating in any of the federally assisted programs in that state.
>
> As was explained a number of times on the floor of the Senate, these interpretations of Title VI are inaccurate. The title is designed to limit any termination of federal assistance to the particular offenders in the particular area where the unlawful discrimination occurs. Since this was our intention, we have made this specific in the provisions of Title VI by adding language to 602 to spell out these limitations more precisely. This language provides that any termination of federal assistance will be *restricted to the particular political* subdivision which is violating non-discrimination regulations established under Title VI. It further provides that the termination shall affect only the *particular program, or part thereof,* in which such a violation is taking place.

88 Cong. Rec. 8627 (1964) [Emphasis added]. Senator Javits also noted that:

> Proponents of the bill have continually made it clear that, apart from all these safeguards against arbitrary action, it is the intent of Title VI not to require wholesale cut-offs of federal funds from all federal programs in entire states, but instead to require a *careful case by case* application of the principle of non-discrimination *to those particular activities* which are actually discriminatory or segregated. . . .

Id. at 7103 [Emphasis added].

Defendants have admitted that in both cases, they did not focus on particular federally financed programs or institutions.[30] Defendants contend that, though Title VI does require a program-by-program analysis, such an examination need not be conducted until the administrative hearing, wherein the agency must "specifically identify the Federal financial assistance going directly to the . . . program or infected by the discriminatory environment which exist in the program." (Defendants' Post-Hearing Memorandum, at 19, Civil Action No. N-76-23). Plaintiffs, in each case, counter that the programmatic analysis must be conducted prior to the enforcement hearing, during voluntary compliance efforts. Hence, this Court is presented with a novel issue, which this Court believes is one of first impression — at what stage must an agency assume a programmatic approach?

Plaintiffs offer numerous compelling reasons in support of their contention. The first, and possibly most persuasive, is the inherent futility of attempting to secure voluntary compliance of Title VI in a major system where the offending program is unknown. It is paradoxical to assume that a recipient of federal funding, such as a state or a large city, could rectify any discriminatory programs within its system without

[30] For HEW's lack of programmatic review of Maryland, *see e.g.,* Deposition, Holmes, at 197-99. For Baltimore City's, *see e.g.,* Tr. at 130 (testimony of Harold Davis).

ever being informed which program was considered by HEW to be operating discriminatively. Consequently, a statewide or citywide approach to enforcement of Title VI is doubtless, not conducive to compliance by voluntary means and, in all likelihood, contrary to Congressional non-vindictive intent.

Other reasons come to the fore which, likewise, suggest that plaintiffs' reading of Title VI in this regard is a proper one. As will be developed *infra*, in both the State system and the City system there are multidunial programs receiving federal financing which, due to the non-programmatic approach assumed, are being condemned by defendants en masse. In Baltimore City alone there are seventy-five programs serving such diverse concerns as sickle cell anemia research and remedial summer programs for students,[31] while in its State counterpart, there is federal funding to programs within twenty-eight institutions of higher education ranging from a unique cancer research center to the student work study program.[32] To compel all of these programs, regardless of whether or not each is discriminatory, to prepare a defense and endure protracted enforcement proceedings is wasteful, counterproductive, and probably inimical to the interests of the very persons Title VI was enacted to protect. It is far more equitable, and more consistent with Congressional intent, to require program delineation prior to enforcement hearings than to include all programs in enforcement proceedings. As the Fifth Circuit observed in *Board of Public Instruction v. Finch, supra*, "a program [should not] suffer for the sins of others." 414 F.2d at 1078.[33]

[31] *See.* Plaintiffs' Reply Memorandum to Defendants' Post-Hearing Memorandum, at 18, Civil Action No. N-76-23.

[32] *See,* Plaintiffs' Post Trial Memorandum at 8-9, Civil Action No. N-76-1.

[33] Remarks of Senator Pastore on the floor of the Senate would seem to add Congressional support to this view. He noted that by Title VI. Congress was "not seeking to penalize people by way of pressure and saying that we can cure this one case if we twist the arms of 99 people." 110 Cong. Rec. 7061 (1964).

Consequently, this Court concludes that, in the interest of justice, Title VI demands a program-by-program breakdown *prior* to enforcement proceedings (during voluntary compliance efforts). Since defendants have conducted no such examination, defendants have not complied with mandates of Section 2000d-1.[34]

In light of the foregoing rather extensive exposition describing HEW's failure to act in accordance with § 2000d-1, this Court is of the opinion that these cases fall squarely within the purview of the exception to the doctrine of exhaustion of administrative remedies enunciated in *Leedom v. Kyne, supra.* HEW acted with palpable disregard of the statutory prerequisities, often actually preventing effectuation of Congressional intent as provided in § 2000d-1.[35] Therefore, the *Leedom*

[34] The Court recognizes that compelling a programmatic breakdown prior to hearing herein decreases defendant's ability to wield a $65,000,000 or $23,000,000 sledgehammer. However, that result appears to be a necessary concomitant of protecting the innocent beneficiary of federal funding.

[35] Though this Court is unconcerned with the motivations behind HEW's arbitrary behavior, we must recognize the presence of outside considerations. First, as described previously. HEW's efforts were, quite properly, provoked by *Adams v. Richardson, supra.* Subsequently, at least an inference can be drawn that HEW was attempting, not merely desegregation of the Maryland systems, but to place Maryland in the position of being the guinea pig for HEW's compliance efforts. This was evidenced by a memorandum of defendant Gerry, wherein he wrote to Secretary Mathews that:

> In any event, the initiation of an enforcement action will greatly assist in building our credibility with other states and with the court [in *Adams*].
>
> The other issue presented is really a symbolic one. If we initiate enforcement action against Maryland we have the option of also deferring the state's eligibility for new Federal funding. As best we can determine, very little money would be affected by such a decision. It would, however, be regarded by the civil rights groups as a symbol of our sincerity in putting maximum pressure

exception obtains herein, and this Court is not precluded by the exhaustion doctrine from assuming jurisdiction over the within controversies.[36]

INJURY TO PLAINTIFFS

The actions of defendants, if permitted to continue unrestrained, threaten to inflict severe harm on plaintiffs' programs. Unfortunately, not only programs are harmed, but people are harmed, most often the very people the statute was enacted to assist. We turn now to a discussion of the degree of injury to each plaintiff.

State of Maryland

In Maryland there are sixteen community colleges, seven state colleges, and two state universities which receive, in the aggregate, $65,000,000 in federal funds. (Tr. at 164). This sum, subject of the within controversy, funds a vast assortment of programs within the schools of higher education in the State. A description of the typical schools and programs affected by HEW's actions offers much enlightenment.

on institutions to voluntarily comply. For these reasons, we recommend in favor of imposing the deferral.

Plaintiffs' Exh. 11, Memorandum dated August 29, 1975, Civil Action No. N-76-1.

Of course, if HEW was acting in this manner, it in itself, would violate Title VI:

> (a) It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 and section 182 of the Elementary and Secondary Education Amendments of 1966 dealing with conditions of segregation by race, whether de jure or de facto, in the schools of the local educational agencies of any State *shall be applied uniformly in all regions of the United States whatever the origin or cause of such segregation.*

42 U.S.C. § 2000d-6 (1970).

[36] This Court, having reached this conclusion, need not consider whether the second cited exception to exhaustion derived from *Jewel Companies, Inc. v. FTC,* would be applicable here.

Dr. Andrew Billingsley, President of Morgan State University[37] and author of *Black Families in White America,* testified extensively at the January 1976 hearing to the detrimental effects of HEW's actions on Morgan State University, and on the black community as a whole. Dr. Billingsley indicated that since $4,000,000 of Morgan's $16,000,000 budget was derived from federal funds, the University's existence hinged upon HEW's activities. Continuation of HEW's arbitrary conduct would have the following effect, according to him:

> Black people in this country are notoriously low income. About eighty percent of our students are dependent on some type of financial aid so that financial move itself, whatever reason you did it, would have a detrimental effect on Morgan.
>
> It would destroy Morgan University and the other black colleges in the State, and, therefore, it would destroy opportunity for these youngsters to get an education.

Tr. at 196-97.

Dr. James Lee Fisher, President of Towson State College,[38] testified that of the $3,600,000 received in federal government funds, $3,500,000 are granted to students, either directly or indirectly. Dr. Fisher testified that at Towson the minority student would bear the brunt of defendants' behavior, since the *nine* percent minority obtains *fifty-seven* percent of all scholarship, grant and work-study monies. He logically concluded thwt a loss of funds would have "a disproportionate impact on minority students." "[P]rogress that has been made [in aiding minority students] would be virtually shut off." (Tr. at 204). He further noted:

[37] Morgan State University is an excellent, predominately black institution with approximately 12% of its 6,400 student total enrollment non-black.

[38] Towson State College has 14,300 students enrolled and has approximately a nine percent black undergraduate enrollment.

> [T]he thing that I believe that is of the most concern to us is it seems that students are the innocent victims in contention in which they virtually have no voice, that literally thousands of students and millions of dollars will be affected or could be affected by the issue that in terms of Towson State College is both unfair and unwarranted.

Tr. at 203-04.[39]

Robert C. Brown, Director of Business Services at the Baltimore Campus of the University of Maryland, testified that currently the Baltimore campus receives approximately $24,000,000 in federal funds, being dispersed as follows: School of Medicine, $12,800,000; School of Dentistry, $2,700,000; School of Nursing, $1,600,000; School of Pharmacy, $426,000; and, Baltimore Cancer Research Center, $5,900,000. (Tr. at 213-14). He indicated that the monies were primarily employed for student support, original research, and medical and health care programs. Mr. Brown explicated one such program, the Baltimore Cancer Research Center, which offers treatment and research on lymphatic cancer unavailable elsewhere. The facility serves 37 in-patients per day and 1,000 out-patients per week. Mr. Brown, unequivocally testified that discontinuance of federal funds would doom the Center to immediate closing. (Tr. at 218). Of more importance to the within examination, Mr. Brown also indicated that HEW's actions were presently causing serious problems to the campus. Due to the cloud over the system, he stated it was becoming increasingly difficult to retain and recruit high calibre faculty because these persons frequently engage in federally financed research which has been threatened with discontinuance by HEW. (Tr. at 219-20).

[39] Ironically, even though Towson State College is included in HEW's sweeping condemnation, Dr. Fisher testified that all HEW officials who visited the campus praised the school's desegregation efforts. Tr. at 204.

The Associate Director of the Office of Student Aid at the University of Maryland, College Park, Roscoe Elliott Dann, testified that his department receives $7,000,000 in federal funding, of which $2,225,000 goes directly to minority students through student loans, work-study and grants.[40] Again, as the previous witnesses indicated concerning their programs, Mr. Dann testified that HEW's actions inure to the disproportionate detriment of minority students, since those students ostensively have the greatest vested interest in the continuation of federal funding.

These are just a sample of the institutions and programs receiving federal aid which are under the spectre of defendants' precipitous enforcement proceedings. It is patent by this review that HEW's arbitrary and capricious actions are inimical to the very interests Title VI sought to assure. Furthermore, the beneficiaries under these programs — the cancer victims, disadvantaged students, the ultimate recipients of the health care programs, etc. — should not suffer for the sins of a program not administered in accordance with this Act. For instance, the cancer patients receiving treatment at the Baltimore Center, should not be compelled to face imminent discontinuance of the Center with the concomitant inability to obtain vital treatment, nor should the minority students, many of whom are totally dependent on federal funding, be fearful of loss of government aid due to an agency's misdirected attempts to enforce the Civil Rights Act.

The foregoing illustrates primarily the intangible harm that defendants' actions have precipitated. However, there are also immediate tangible injuries to

[40] The funding breakdown is as follows: National Student Loans. $500,000; College Work-Study, $596,000; Basic Educational Opportunity Grants. $1,500,000; Supplemental Educational Opportunity Grants. $376,000; nursing, $90,000; and, law enforcement, $331,000. The range of small programs receiving federal funds is quite diverse, including such rather unique programs as a Cuban Refugee Loan Fund Program. Tr. at 208.

plaintiffs, for example, due to the defendants' refusal to specify offending programs, the State stands to lose sizable amounts of money by its continuation of the 1974 desegregation plans. For the fiscal year of 1976 alone, the Maryland State Legislature has appropriated $2,300,000 to implement the plan,[41] much of which could be preserved if HEW were to supply some specificity of discriminatory programs. Furthermore, like ripples on a pond, impending loss of up to $65,000,000 seriously disrupts the State's financial condition. Unable to determine whether all, or only some, of the federal funds will be lost, the State's ability to properly budget and appropriate are severely impaired.

In light of the preceding, to force the *entire* system into extensive administrative hearings, with all the inherent costs — money, time, energy, loss of reputation and academic standing — creates no less than irreparable injury to plaintiffs, which, in all fairness, cannot be tolerated.

City of Baltimore.

Baltimore City, the eighth largest school district in the country, suffers many of the same harmful effects as the State of Maryland from defendants' actions. The bludgeon employed in the City's case is not as great as the one aimed at Maryland, but nevertheless, tremendous — $23,000,000. HEW's actions affect City programs benefiting a wide range of interests and purposes, for example: summer programs for exceptional and socially deprived children; staff development; programs for handicapped children; parent training; library resources; human resources; sickle cell anemia; projects for reading; science, mathematical and vocational educational and work-study for low income students. Here again there is much evidence that HEW's overly broad behavior disproportionately affects the very persons Title VI was enacted to protect. By HEW's sweeping

[41] The figure for fiscal year 1977 will, in all likelihood, be increased to $3,000,000. *See* Senate Bill 370; House Bill 900.

cavalier approach, school officials, faculty members, and school children alike must fear discontinuance of the various programs. As Dr. Pearl Brakett, Assistant Superintendent of the Baltimore City Department of Education, stated:

> There are perhaps two or three areas which we have seen the impact of this uncertainty. First with the staff being persons who are currently being employed in programs who are doubtful as to their continuance or get feedback to the effect that it might not be continued have a tendency to look elsewhere for positions and they are in a teeter-totter stage of commitment to their job. That would necessarily affect the type of teaching that would go on, the type of leadership that's affected there. It is important that a person who is working on a job be undivided in their attention toward fulfilling the guidelines and anything that affects the morale in a negative fashion would have that impact.
>
> In a second way we have the children who are in those programs who might have been in the pre-kindergaren level now; when there is no clear determination as to whether the program that they are subject to being involved in at that age at the grade three will be there or not perhaps forecasts a difference in the future of that youngster.

Tr. at 17-18 [quoted without correction].

This is but one of the many illustrations of the effect of HEW's actions upon the system's finest instructors and most needy students. For instance, the loss of reputation alone, by HEW's unwarranted actions, wreaks severe injury on the City. Grover McCrea, a member of the Baltimore City School Board, when testifying concerning the City's diminished credibility indicated:

> I think we have to look at several things and that is the credibility as far as communities are concerned and the board in terms of education and that is if they get the feeling that we are finally stabilizing our system to move on I think that

> communities will get confidence in our school system once again, which is what we are trying to do. And it's very difficult for us to do this with HEW . . . wanting to take us and we are competing against a county that's surrounding us that they are saying are in compliance and, . . . it's a possibility there of students living that close not staying in the City. Plus we also have the parochial schools and, . . . we stand to lose students to either one of those situations. And I think that would hurt us.

Tr. at 36 [quoted without correction].

Moreover, as in the State of Maryland's case, due to defendants' gross approach, the City is confronted with a major dilemma in considering and effectuating a workable budget. Mayor Schaefer set forth their problem:

> You know when you have hanging over your head that you're going to lose $23,000,000 year after year, when you know that it will be almost impossible to make that money up, you just can't withdraw twenty million dollars from the City from an area where HEW funds really directly help the young people that should be helped. . . .

Tr. at 67.

Additionally, Baltimore City suffers further injury due to a factor not present in the Maryland case — the deferral of federal funds. As previously described. HEW deferred, in May 1975, all federal funds which the City could ordinarily obtain to supplement existing programs. Mayor Schaefer testified that this aspect of not affect the level of funding to pre-deferral programs, it does have injurious effects. First, and most obvious, deferral disallows initiation of new innovative programs. Mayor Schafer testified that this aspect of deferral had the following deleterious effect on the City:[42]

[42] The City has received additional harm by HEW actions which merits mentioning, albeit briefly. The City has been prevented from utilizing programs of the Government which were available before the advent of HEW's actions, for example, the purchase of government surplus. *See*, Tr. at 23, testimony of Benjamin Whitten.

> [T]he fact that we were cut off from new programs, that was, in a way, a *disaster to the City*, when you can't continue on getting new things because you are not eligible under federal Funding for programs that are desperately needed for the disadvantaged. . . . [sic]

Tr. at 67-68 [Emphasis added]. The second aspect of deferral causing injury to plaintiffs is the effect of inflation on funds received under the pre-deferral programs. Since the level of funding to these programs remains constant during the deferral, it is elementary that this, over a period of time, results in a net loss in value received. Hence, this loss of actual value, due to HEW's arbitrary deferral, inhibits the City's continuation of the necessary ongoing programs.

It is evident that, like Maryland, Baltimore City suffers severe and irreparable injury by defendants' unwarranted actions which cannot be allowed to continue.

SOVEREIGN IMMUNITY

As a second defense, defendants assert that the doctrine of sovereign immunity bars this action. Doubtless, the doctrine of sovereign immunity would be an available defense if the instant cases sought to enjoin actions of the United States. *See Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949); *Land v. Dollar*, 330 U.S. 731, 67 S. Ct. 1009, 91 L. Ed. 1209 (1947). However, the complaints were drawn in such a manner as to avoid any misunderstanding that the acts were solely acts of the officers of HEW, beyond their power and in direct contravention of Title VI of the Civil Rights Act. In such cases — where officials commit unlawful and ultra vires behavior — it is not considered an action against the sovereign and the doctrine of sovereign immunity does not apply. *See Dugan v. Rank*, 372 U.S. 609, 83 S. Ct. 999, 10 L. Ed. 2d 15 (1963); *Malone v. Bowdoin*, 369

U.S. 643, 82 S. Ct. 980, 8 L. Ed. 2d 168 (1962); *Larson, supra.* As the Court in *Larson* stated:

> [W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief. . . .

337 U.S. at 689, 69 S. Ct. at 1461, 93 L. Ed. at 1636.

Since the agents of HEW acted completely ultra vires, and contrary to the statutory mandates, the instant cases are squarely within the rationale of *Larson* and its progeny. Therefore, sovereign immunity does not bar relief being granted to plaintiffs.

CONCLUSION

After careful consideration of all of the pleadings, exhibits, depositions, evidence, briefs and arguments in these cases, this Court concludes that the officials of the Department of Health, Education and Welfare are acting in contravention of Title VI of the Civil Rights Act of 1964. These individuals have not followed the mandates of the Act in that they have arbitrarily and whimsically failed to attempt to work toward compliance by voluntary means[43] and have vindictively refused to assume a programmatic approach.

[43] In Baltimore City's case recent Congressional action provides an additional reason to order further negotiations between the parties. On January 28, 1976, Congress enacted Public Law 94—206 (H.R. 8069), 90 Stat. 3 (1976), which *inter alia* prevents HEW-ordered school bussing:

> Sec. 209. None of the funds contained in this Act shall be used to require, *directly or indirectly,* the transportation of any student to a school other than the school which is nearest the student's home, and which offers the courses of study pursued by such student, in order to comply with title VI of the Civil Rights Act of 1964.

Id. at 22 (emphasis added).

When HEW and the City negotiated, the standard generally employed was the "nearest-next-nearest" school

Accordingly, the Court requests counsel for the plaintiffs in each of these cases to submit preliminary injunctions requiring the defendants to discontinue administrative enforcement until such time as defendants have, in good faith, specified the programs not in compliance with Sections 2000d and 2000d-1 of Title VI of the Civil Rights Act of 1964, and until the defendants have sought compliance by voluntary means as to each program or activity specified as being in non-compliance, as mandated by the Act.[44]

standard contained in 20 U.S.C. §1714(a) (1970), Equal Educational Opportunity Act of 1974. Consequently, since Public Law 94-206 would, in all probability, disallow such approach to be taken today, this provides further reason to reconvene the negotiation process.

[44] This decision is *not* to be construed as having any bearing on the issue of compliance of the State of Maryland or the City of Baltimore with Title VI. This decision is intended by the Court solely as a mandate to compel the parties to resume negotiations, much in the spirit described by Lt. Governor Blair Lee:

> Well, if we are meeting and talking as partners in a worthy enterprise, which would be the case, and when I say partners, I mean partners, two entities with mutual respect for each other and presumably with a measure of intelligence applied on each side, I don't see why we can't get it worked out.

[Tr. at 390-91].

Order Filed March 9, 1976

United States District Court
For The District Of Maryland

Civil Action No. N-76-1

Marvin Mandel, et al.

Plaintiffs

v.

United States Department of Health, Education, And Welfare et al.

Defendants

ORDER

The above-captioned case having been heard upon Plaintiffs' motion for preliminary injunction and Defendants' motion to dismiss, testimony having been taken and evidence introduced, memoranda having been filed and oral arguments of counsel having been heard, after careful consideration of all of the pleadings, exhibits, depositions, evidence, briefs, and arguments and for the reasons set forth in the written opinion of this Court filed on March 8, 1976, it is hereby,

ORDERED, that pending a final determination on the merits of the Complaint, Defendants, their successors in office, their agents, and others acting in concert with them, are affirmatively hereby ordered to:

1. Cease and desist from acting outside the jurisdiction conferred upon them by Title VI and the HEW regulations promulgated thereunder.

2. Cease and desist from acting in violation of Title VI and the HEW regulations promulgated thereunder.

3. Cease and desist from acting or purporting to act on the basis of HEW regulations inconsistent with Title VI.

4. Cease and desist from arbitrary, capricious, ultra vires, vindictive, and whimsical actions taken with respect to Plaintiffs purportedly under the authority of Title VI and/or the HEW regulations promulgated thereunder.

5. Cease and desist from asserting, directly or by implication, that Plaintiffs have failed to comply with Title VI and/or the HEW regulations unless and until a violation has been properly found in the manner required by Paragraph 8 below.

6. Cease and desist from asserting that there is non-compliance with Title VI in the administration of any or all statutory aid programs through which Federal financial assistance is distributed to public institutions of higher education in the State of Maryland on the basis of non-compliance alleged to exist in any other program(s) and/or at any other institution(s) and/or on the basis of generalized allegations regarding the existence of discrimination at any or all public institutions of higher education in the State of Maryland.

7. Refrain from deferring or otherwise interfering with the award to or receipt by Plaintiffs of any Federal financial assistance and from in any other way interfering with Plaintiffs' eligibility to receive financial assistance from any Federal agency, on account of Plaintiffs' compliance status with Title VI and/ or the HEW regulations promulgated thereunder unless and until Defendants, after complete and good-faith adherence to the procedures specified in Paragraph 8 below, have determined the existence of non-compliance and further determined that compliance can not be secured by voluntary means.

8. Cease and desist from initiating, or taking any steps toward the initiation of, any and all administra-

tive proceedings with respect to alleged non-compliance by Plaintiffs with Title VI or the HEW regulations promulgated thereunder unless and until Defendants shall have in good faith taken each of the following actions in the order specified:

(a) Adopted and promulgated administrative regulations setting forth specific standards for compliance with Title VI in the administration of programs of Federal financial assistance by institutions of higher education receiving such assistance, which regulations shall be of general applicability, shall apply uniformly in all regions of the United States whatever the cause of any discrimination, and shall be consistent with achievement of the objectives of the various statutes authorizing federal financial assistance.

(b) Made a separate and specific analysis of each and every statutory aid program through which Federal financial assistance is distributed to institutions of public higher education in the State of Maryland to determine the existence of non-compliance in the administration of any such program.

(c) In the event that, after the analysis described in (b) above, non-compliance has been alleged to exist in any statutory aid program, made a good-faith effort to achieve compliance by voluntary means in each separate program in which non-compliance is alleged to have been found.

(d) In the event that, after the analysis described in (b) above, non-compliance has been alleged to exist in any statutory aid program, specified the actions which, in Defendants' view, are necessary to remedy the alleged non-compliance and specified standards by which the existence of non-compliance will be determined.

9. Refrain from taking any action that directly or indirectly would have the effect of retaliating against Plaintiffs for initiating and pursuing this civil action, and thus would deny Plaintiffs further rights, privileges, and immunities secured by the Constitution and laws of the United States of America.

IT IS FURTHER HEREBY ORDERED, that the security in the amount of Ten Dollars ($10.00) previously posted by Plaintiffs with the Clerk of Court be and the same hereby is continued for the duration of this Order.

IT IS FURTHER HEREBY ORDERED, that Defendants' Motion to Dismiss be, and the same hereby is, DENIED.

EDWARD S. NORTHROP,
Chief United States District Judge.

9th March 1976
at 2:18 P.M.

Memorandum and Order

Filed April 20, 1976

(Mandel v. United States Department of Health, Education, and Welfare, 417 F. Supp. 57 (D.Md. 1976))

United States District Court
District of Maryland

Civil Action No. N-76-1

Marvin Mandel, Governor of the State of Maryland, et al.

v.

United States Department of Health, Education and Welfare, an agency of the United States of America, et al.

Civil Action No. N-76-23

Mayor and City Council of Baltimore, a Municipal Corporation, et al.

v.

F. David Mathews, Individually and as Secretary of the United States Department of Health, Education and Welfare, et al.

* * * * * *

NORTHROP, Chief Judge.

Before this Court are defendants' motions, pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, to stay the judgments entered by this Court on March 9,

1976, and March 12, 1976, pending appeals to the United States Court of Appeals for the Fourth Circuit. Defendants' motions and joint memorandum assert that stays should be granted under the rationale of *Long v. Robinson,* 432 F.2d 977, 979 (4th Cir. 1970), which sets forth four requisites for a stay: (1) that defendants are likely to succeed on the merits of their appeal; (2) that plaintiffs will not suffer irreparable injury if a stay is granted; (3) that defendants will suffer irreparable injury if a stay is not granted; and (4) that a stay is in the public interest.

After careful consideration of defendants' proffer, this Court is not persuaded that the facts support the issuance of stays. In fact, not only do the facts fail to meet the guidelines of *Long v. Robinson,* but they, in major part, stand in contravention of the contentions offered in support of the motions.

First, under *Long v. Robinson,* defendants argue that they are likely to prevail on the merits of the appeal. Defendants bottom this bald statement upon their assertion that these proceedings should have been dismissed for lack of final agency action (or, restated, failure to exhaust administrative remedies), citing *Taylor v. Cohen,* 405 F.2d 277 (4th Cir. 1968). However, this issue was extensively considered and discussed in this Court's joint opinion of March 8, 1976. There, it was decided that cases such as *Taylor* were inapposite to the cases at hand, and the Court applied the exception to the exhaustion doctrine contained in *Leedom v. Kyne,* 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210 (1958). Since nothing defendants offer here alters this view, defendants have failed to satisfy even the first tenet of *Long v. Robinson.*

Defendants assert, to satisfy the second requisite of *Long,* that plaintiff will not be substantially harmed by the issuance of a stay. In light of the extensive analysis of plaintiffs' injuries in the March 8th opinion, there is no doubt that substantial injury would inure to

plaintiffs if the judgments were stayed.[1] To allow defendants to run rampant with their precipitous activities unquestionably would not only render serious injury to plaintiffs, but would be inimical to the interests of those persons Title VI of the Civil Rights Act, 42 U.S.C. §2000d *et seq.* (1970) was enacted to protect. Hence, contrary to defendants' averment, this Court feels plaintiffs would suffer substantial injury by the issuance of stays.

The third criterion for the issuance of a stay is that there is likelihood of harm to defendants should the stay not be issued. Defendants cite as their foremost injury the possibility that the Orders of March 9 and March 12, 1976, could be construed to be applicable to HEW's negotiations with other recipients of federal funding. Clearly this reading of the Orders is a misconstruction of the intent of the Orders. Under no circumstances were the Orders intended to govern compliance efforts outside Maryland; they were to be controlling solely upon the parties to these actions. Moreover, should any of the additional harm alleged by defendants come to pass following a refusal to stay the judgments, it would arise, not because of the judgments themselves, but because of HEW's own refusal to negotiate with plaintiffs in good faith. As Judge Harrison L. Winter stated in an analogous situation:

> Regrettably I must conclude that the principal irreparable injury which defendants claim that they will suffer if the order of the district court is not stayed is injury of their own making. . . . It would seem elementary that a party may not claim equity in his own defaults.

[1] Defendants attempt to make much of the fact that the Court termed a portion of plaintiffs' injury "intangible" in the March 8th opinion. Though the term "intangible" was ascribed to certain injuries, it was in no way intended to diminish the extent of injury which the Court felt had been sustained by plaintiffs. Coupling these so-called "intangible" injuries with the more tangible injuries also present, there was an extensive showing of severe injury to all plaintiffs by defendants' actions.

Long v. Robinson, supra at 981. Since defendants' possible injury arises out of their own defaults, they should not be granted stays to minimize any potential harm.

The fourth criterion of *Long v. Robinson* for a stay is whether a stay will serve the public interest. On balance, considering the serious harm which defendants' actions have inflicted upon countless persons in Maryland (as explicated by the March 8, 1976 opinion), the Court must conclude that the public interest would *not* be served by the issuance of the stays, but would be by a refusal to stay the judgments. To approve stays in these cases would sanction the continuance of a policy inimical to the interests of a wide spectrum of persons in the City and State — the school children, the teachers, the disadvantaged, the infirm and numerous others. Certainly, nothing with such a grave impact could be considered to be in furtherance of public policy.

It is patent by the foregoing discussion, and the March 8th opinion, that defendants have not met the test for stays set forth in *Long v. Robinson*. Nor have defendants offered any further reason compelling this Court to "grant to [defendants] precisely the form of blanket [approbation] pending appeal which we refused to grant them on the merits." *Environmental Defense Fund, Inc. v. Froehlke*, 348 F. Supp. 338, 367 (W. D. Mo. 1972), *aff'd*, 477 F.2d 1033 (8th Cir. 1973). This Court has no other recourse but to refuse defendants' motions for stays of the judgments in these cases pending appeal.

In light of the foregoing analysis, IT IS, this 20th day of April, 1976, by the United States District Court for the District of Maryland, ORDERED:

1. That defendants' motions for stays of judgments in these cases pending appeal BE, and the same hereby ARE, DENIED;

2. That the Clerk of the Court will mail copies of this Memorandum and Order to all counsel of record in these cases.

Order filed May 28, 1976

United States Court of Appeals
for the Fourth Circuit

No. 76-1493

Mayor and City Council of Baltimore, et al.,
Plaintiffs,

v.

F. David Mathews, Secretary, United States Department of Health, Education and Welfare, et al.,
Defendants.

No. 76-1494

Marvin Mandel, Governor of the State of Maryland, et al.,
Plaintiffs,

v.

United States Department of Health, Education and Welfare, et al.,
Defendants.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, Chief Judge.

ORDER

These appeals are consolidated. Motion to stay the orders entered by Judge Northrop are denied. The motions to expedite the appeals are denied. The

suggestion that the court consider the appeals en banc is deferred, no member of the court having requested a poll.

Done with the concurrence of Judges Butzner and Russell.

This 28th day of May, 1976.

s/ J. BRAXTON CRAVEN, JR.,
United States Circuit Judge.

Order filed December 10, 1976

United States Court of Appeals
for the Fourth Circuit

No. 76-1493

Mayor and City Council of Baltimore, a municipal corporation; Board of School Commissioners of Baltimore City,
Appellees,

v.

F. David Mathews, individually and as Secretary of the United States Department of Health, Education and Welfare; Martin H. Gerry, individually and as Acting Director, Office for Civil Rights United States Department of Health, Education and Welfare; United States Department of Health, Education and Welfare, an agency of the United States of America; and Irvin N. Hackerman, individually and as Administrative Law Judge United States Department of Health, Education and Welfare,
Appellants.

No. 76-1494

Marvin Mandel, Governor of the State of Maryland; State of Maryland; Maryland State Board for Community Colleges, an agency of the State of Maryland; Maryland Council for Higher Education, as agency of the State of Maryland; Board of Trustees of Morgan State University, an agency of the State of Maryland; Board of Trustees of St. Mary's College of Maryland, an agency of the State of Maryland; Board of Trustees of the State Colleges of Maryland, an agency of the State of Maryland; The University of Maryland, an agency of the State of Maryland; Board of Trustees of The Community College of Baltimore, an agency of the Mayor and City Council of Baltimore, on behalf of itself and all other Public Junior and Community Colleges of the various political subdivisions lying within the State of Maryland,

Appellees,

v.

United States Department of Health, Education and Welfare, an agency of the United States of America; F. David Mathews, individually and in his official capacity as Secretary of the United States Department of Health, Education and Welfare; Martin H. Gerry, individually and in his official capacity as Acting Director of the Office for Civil Rights of the United States Department of Health, Education, and Welfare; Dewey E. Dodds, individually and in his official capacity as Acting Deputy Director of the Office for Civil Rights of the United States Department of Health, Education, and Welfare; Roy McKinney, individually and in his official capacity as Acting Director of the Higher Education Division of the Office for Civil Rights of the United States Department of Health, Education, and Welfare; Burton Taylor, individually, and in his official capacity as Chief of the Program and Policy Branch of the Higher Education Division of the Office for Civil Rights of the United States Department of Health, Education, and Welfare; St. John Barrett,

individually and in his official capacity as Acting General Counsel of the United States Department of Health, Education, and Welfare; and Ronald Gilliam, individually and in his official capacity as Acting Regional Civil Rights Director for Region III of the Office for Civil Rights of the United States Department of Health, Education, and Welfare,

Appellants.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, District Judge.

A majority of the active judges of the Court having voted in favor of a rehearing en banc,

IT IS ADJUDGED AND ORDERED that a rehearing en banc be scheduled in the above-referenced cases at the earliest available term of court.

For the Court — by Direction.

WILLIAM K. SLATE, II,
Clerk.

Opinions filed August 9, 1977, and August 25, 1977 (Mayor and City Council v. Mathews, 562 F.2d 914 (4th Cir. 1977))

United States Court of Appeals
for the Fourth Circuit

No. 76-1493

Mayor And City Council of Baltimore, a Municipal Corporation and Board of School Commissioners of Baltimore City, Appellees,

v.

F. David Mathews, Individually and as Secretary of the United States Department of Health, Education, and Welfare, Martin H. Gerry, Individually and as Acting Director, Office for Civil Rights, United States Department of Health, Education, and Welfare, United States Department of Health, Education, and Welfare, an agency of the United States of America, and Irvin N. Hackerman, Individually and as Administrative Law Judge, United States Department of Health, Education, and Welfare, Appellants,

NAACP Legal Defense and Educational Fund, Inc., Amicus Curiae.

No. 76-1494

Marvin Mandel, Governor of the State of Maryland, State of Maryland, Maryland State Board for Community Colleges, an agency of the State of Maryland, Maryland Council for Higher Education, an agency of the State of Maryland, Board of Trustees of Morgan State University, an agency of

the State of Maryland, Board of Trustees of St. Mary's College of Maryland, an agency of the State of Maryland, Board of Trustees of the State Colleges of Maryland, an agency of the State of Maryland, the University of Maryland, an agency of the State of Maryland, Board of Trustees of the Community college of Baltimore, an agency of the Mayor and City Council of Baltimore, on behalf of itself and all other Public Junior and Community Colleges of the various political subdivisions lying within the State of Maryland, Appellees,

v.

United States Department Of Health, Education, And Welfare, an agency of the United States of America, F. David Mathews, Individually and in his official capacity as Secretary of the United States Department of Health, Education, and Welfare, Martin H. Gerry, Individually and in his mfficial capacity as Acting Director of the Office for Civil Rights of the United States Department of Health, Education, and Welfare, Dewey E. Dodds, Individually and in his official capacity as Acting Deputy Director of the Office for Civil Rights of the United States Department of Health, Education, and Welfare, Roy McKinney, Individually and in his official capacity as Acting Director of the Higher Education Division of the Office for Civil Rights of the United States Department of Health, Education, and Welfare, Burton Taylor, Individually and in his official capacity as Chief of the Program and Policy Branch of the Higher Education Division of the Office for Civil Rights of the United States Department of Health, Education, and Welfare, St. John Barrett, Individually and in his official capacity as Acting General Counsel of the United States Department of Health, Education, and welfare, and Ronald Gilliam, individually and in his official capacity as Acting Regional Civil Rights Director for Region III of the Office for Civil Rights of the United States Department of Health, Education, and Welfare, Appellants,

NAACP Legal Defense and Educational Fund, Inc., Amicus Curiae,

The American Council on Education, the Association of American Universities, the National Association of State Universities and Land Grant Colleges, the American Association of State Colleges and Universities and the American Association of Community and Junior Colleges; The National Association of Attorneys General; and The States of Alaska, Arizona, Connecticut, Delaware, Florida, Idaho, Illinois, Iowa, Kansas, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oregon, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming, and the Commonwealths of Kentucky and Virginia, Amici Curiae,

The Commonwealth of Pennsylvania, Amicus Curiae,

Trustees of the California State University and Colleges and Regents of the University of California, Amici Curiae.

Argued Feb. 14, 1977.
Decided Aug. 9, 1977.

Before Haynsworth, Chief Judge, and Winter, Craven,* Butzner, Russell, Widener and Hall, Circuit Judges, sitting *en banc*.

WINTER, Circuit Judge:

These consolidated appeals began, respectively, as two separate actions by the Mayor and City Council of Baltimore (No. 76-1493) and the Governor of Maryland and several Maryland state educational agencies (No. 76-1494) against the United States Department of Health, Education, and Welfare and several of that

* Judge Craven died before the filing of the opinions which follow. Before his death, however, he concurred in the judgment and approved the language of Parts I and II of the majority opinion.

agency's officials (HEW). Their complaints sought declaratory and injunctive relief against HEW's alleged arbitrary and illegal methods of enforcement of Title VI of the 1964 Civil Rights Act, §§ 601 *et seq.* of the Act, 42 U.S.C. §§ 2000d *et seq.* At the time that Maryland sued, HEW was about to initiate administrative enforcement of Title VI, i.e., administrative proceedings which might result in the termination of outstanding grants of federal funds and the denial of new grants, with respect to Maryland's system of higher education. When Baltimore sued, HEW's administrative proceedings which might result in the termination of federal funds with respect to Baltimore's elementary and secondary schools had been initiated and hearings were scheduled to begin approximately one month after the date that suit was filed.

The district court granted injunctive relief, holding that HEW had acted in contravention of Title VI in seeking compliance therewith by (1) failing "arbitrarily and whimsically" to attempt to secure compliance with Title VI by voluntary means, and (2) "vindictively" refusing to assume a programmatic approach in the negotiation process. HEW was enjoined (1) from proceeding with the pending administrative enforcement proceedings against Baltimore and Maryland, (2) from deferring consideration of applications for future funding, and (3) from reinstituting administrative enforcement proceedings until HEW had, *inter alia*, (a) adopted and promulgated administrative regulations, effective uniformly throughout the United States, setting forth specific standards for compliance with Title VI in the administration of programs of federal financial assistance to institutions of higher education, (b) made a separate and specific analysis of each statutory aid program to determine the existence of noncompliance in the administration of such program, and (c) specified the actions which, in HEW's view, are necessary to remedy the alleged noncompliance and specified standards by which the existence of noncompliance will be determined. *Mandel v. U.S. Dept. of*

Health, Education and Welfare, 411 F. Supp. 542 (D. Md. 1976).

We agree that Maryland is entitled to injunctive relief, but not in the form granted by the district court. We disagree that Baltimore is entitled to any relief. We think that the district court should have concluded that, on the record before it, it would have been improper to grant relief in Baltimore's case. We reach these conclusions for the reasons that follow.

I.

Title VI of the 1964 Civil Rights Act, §§ 601 *et seq.* of the Act, 42 U.S.C. §§ 2000d *et seq.*, directs that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d. In order to implement the legislative mandate, federal agencies empowered to extend financial assistance are *required* to issue "rules, regulations, or orders of general applicability" to carry out the objectives of § 2000d. 42 U.S.C. § 2000d-1. If recipients of federal aid fail to abide by or to comply with these rules and regulations, the relevant federal agency may terminate outstanding grants, refuse to renew them, or halt consideration of applications for additional funding. *Id.* However, any such action must be preceded by: (1) notice of alleged noncompliance to the offending recipient; (2) a determination that compliance cannot be secured by voluntary means; (3) an express finding on the record, after an opportunity for hearing, that the recipient is not, in fact, complying with the law; and (4) a full written report to committees of the House and Senate having jurisdiction over the program or activity receiving federal aid, within which discrimination is alleged to have occurred. *Id.* Even after these conditions are met, § 602, 42 U.S.C. § 2000d-1, provides that "[n]o such action [terminating or otherwise restricting federal financial assistance] shall become effective until thirty

days have elapsed after the filing of such report." Section 603 of the Act, 42 U.S.C. §2000d-2, provides further that any person aggrieved by such action (including any state or political subdivision thereof) may obtain judicial review under the Administrative Procedure Act, and that no such action shall be deemed "committed to unreviewable agency discretion." The Administrative Procedure Act, in turn, allows the federal agency or federal courts to postpone or stay agency action pending judicial review. It also allows the federal courts to set aside such action in certain specified instances. 5 U.S.C. §§ 705, 706(2).

Given this comprehensive scheme of administrative adjudication, congressional oversight, and judicial review, it is clear that the City of Baltimore and the State of Maryland, before bringing the instant lawsuit, were not faced with an immediate threat of losing federal financial assistance.[1] It is also clear that the

[1] The City's complaint was filed on January 8, 1976.

Between April 17, 1973 and May 5, 1975, the City negotiated with HEW concerning the desegregation of its elementary and secondary schools. On May 5, 1975, HEW, dissatisfied with the progress of the negotiations, filed a formal request for an administrative hearing (together with a recommendation that all federal financial assistance to the City school system be terminated.) II App. 163-73 (No. 76-1493).

Administrative hearings were scheduled to begin on February 3, 1976, but were, of course, foreclosed by the district court's injunction. It is important to note that at the time of the City's complaint it was still at least three full steps away from an actual termination of federal aid: (1) an express finding by the administrative law judge that Title VI had been violated; (2) a written report to appropriate congressional committees; and (3) in all likelihood, judicial review (as a matter of right) of any determination adverse to the City's interest.

The State's complaint was filed on January 5, 1976.

Between March 12, 1969 and December 15, 1975, the State negotiated with HEW concerning the desegregation of its university system. On December 15, 1975, Martin H. Gerry, Acting Director of HEW's Office for Civil Rights, made the following comments in a letter addressed to Governor Marvin Mandel: (1) HEW was dissatisfied with the progress of

district court invoked the extraordinary remedy of prior restraint against administrative proceedings which were far from complete, and were subject to review (as a matter of right) before taking effect.

By issuing an interlocutory injunction, the district court ignored a "long settled" rule of judicial administration and its first corollary: (1) a litigant "is [not] entitled to judicial relief for any supposed or threatened injury until the prescribed administrative remedy has been exhausted";[2] and (2) "judicial intervention in uncompleted administrative proceedings, as distinguished from judicial checking by statutorily-established methods of review," is strongly disfavored as a matter of general practice.[3] The district court

negotiations to date; (2) the State was continuing to violate Title VI; and (3) pursuant to his authority, he would recommend that administrative hearings be commenced. I App. 150-53 (No. 76-1494). The district court's injunction prevented any formal request from being issued.

It is clear that the State, at the time of its complaint, was still at least four full steps away from the termination of any federal aid: (1) a formal request for administrative hearings (together with HEW's request for sanctions); and steps (1) through (3), *supra*, noted in relation to the City's case.

[2] *McKart v. United States*, 395 U.S. 185, 193, 89 S. Ct. 1657, 1662, 23 L. Ed. 2d 194 (1969); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 58 S. Ct. 459, 82 L. Ed. 638 (1938); 3 K. Davis, Administrative Law Treatise § 20.01 at 56 (1958 ed.). *See Johnson v. United States*, 126 F.2d 242, 247 (8 Cir. 1942).

The doctrine of exhaustion has long been part of federal jurisprudence, and is grounded upon a variety of reasons: respect for "administrative autonomy"; a desire that administrative "expertise and discretion" should first be brought to bear upon specialized problems; and conservation of judicial energies and resources. *Nader v. Volpe*, 151 U.S. App. D.C. 90, 466 F.2d 261, 266-68 & nn.32-42 (1972).

[3] *Nader v. Volpe*, 151 U.S. App. D.C. 90, 466 F.2d 261, 268 (D.C. Cir. 1971). *See Whitney National Bank v. Bank of New Orleans*, 379 U.S. 411, 422, 85 S. Ct. 551, 558, 13 L. Ed. 2d 386 (1965):

> [Where Congress] has created a specific statutory scheme for obtaining review, ... the doctrine of exhaustion comes into play and requires that the

justified its action by invoking a recognized exception to the foregoing rules: when an agency acts in "brazen" defiance of its statutory authorization, the courts will not wait for the underlying proceedings to run their course.[4] Rather, the federal courts will intervene to preserve the status quo, prevent the infringement of substantial rights that might otherwise be sacrificed, and protect against the subversion of congressional policy.[5] Two decisions exemplify this doctrine with particular clarity: *Leedom v. Kyne*, 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210 (1958) and our unanimous in

> statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness. *Id.*.

[4] *See, e.g., Leedom v. Kyne*, 358 U.S. 184, 188, 79 S. Ct. 180, 3 L. Ed. 2d 210 (1958) (district court had jurisdiction to award interim decree setting aside NLRB certification; NLRB found to violate express statutory command in the certification of bargaining units); *Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 562-63, 39 S. Ct. 375, 63 L. Ed. 772 (1919) (district court had jurisdiction to award interim decree enjoining enforcement of ICC order; ICC found to have permitted new rate filings without hearings required by statute); *American General Insurance Co. v. FTC*, 496 F.2d 197, 200-01 (5 Cir. 1974) (district court lacked jurisdiction to enjoin FTC antitrust proceeding; FTC did not clearly violate a jurisdictional statute); *Coca Cola Co. v. FTC*, 475 F.2d 299, 303-04 (5 Cir.), *cert. denied*, 414 U.S. 877, 94 S. Ct. 121, 38 L. Ed. 2d 122 (1973) (district court lacked jurisdiction to order joinder of parties in FTC proceedings; FTC did not violate any statutory command by refusing to join the parties); *Taylor v. Cohen*, 405 F.2d 277, 280-81 (4 Cir. 1968) (district court lacked jurisdiction to enjoin HEW enforcement proceedings; HEW fully complied with civil rights statute in ordering said proceedings); *Elmo Division of Drive-X Co. v. Dixon*, 121 U.S. App. D.C. 113, 348 F.2d 342, 344-45 (1965) (district court had jurisdiction to award interim decree enjoining continuation of FTC inquiry into objectionable advertising; FTC was required by statute to proceed by reopening an earlier case).

[5] Put another way, "[t]he deeply established tradition is that courts are available to protect private parties against administrators who are acting in excess of their authority." K. Davis, Administrative Law Treatise § 21.00 at 677 (1970 Supp.).

banc decision in *Taylor v. Cohen*, 405 F..d 277 (4 Cir. 1968).

In *Leedom*, the Supreme Court upheld the propriety of a prior restraint against a certification proceeding brought by the National labor Relations Board. Contrary to express language contained in § 9(b)(1) of the National Labor Relations Act, 29 U.S.C. § 159(b)(1), the Board attempted to certify a mixed professional /nonprofessional bargaining unit. The certification was attacked in federal court, and the NLRB countered by arguing that its determination was not a "final order" otherwise subject to judicial review. The Court, however, disagreed:

> This suit is not one to "review," in the sense of that term as used in the Act, ... Rather, it is one to strike down an order of the Board *made in excess of its delegated powers and contrary to a specific prohibition in the Act.* 358 U.S. at 188, 79 S. Ct. at 184 (emphasis added).

In *Taylor*, like the instant case, plaintiffs sought to restrain the termination of federal financial assistance under Title VI. HEW had determined that a school district's refusal to adopt a complete modification of its "freedom of choice" desegregation plan constituted a continuing violation of the statute. HEW therefore initiated administrative proceedings, after the appropriate notices and determinations, with the objective of terminating federal funding. Plaintiffs, the parents of affected school children, sought and received an injunction from the district court. We reversed, however, holding judicial intervention to be unwarranted and inappropriate, given the fact that "there has been no showing that HEW *disregarded provisions* of the Civil Rights Act of 1964." 405 F.2d at 281 (emphasis added).

We believe (along with the district court) that, consistent with *Leedom* and *Taylor*, the principal question to be decided is whether, on this record, the City and the State have demonstrated that HEW has acted *ultra vires* in its efforts to effect Title VI

compliance by the City and State. If HEW acted erroneously, but within the boundaries of the enabling statute, its mistakes can be corrected only through ordinary congressional and judicial review. On the other hand, if the agency has exceeded its statutory authority, the district court was fully authorized to impose a prior restraint.

II.

We conclude that, vis á vis the State of Maryland, HEW acted *ultra vires*. Accordingly, HEW's acts and omissions firmly established federal jurisdiction and justify the award of injunctive relief, although not in the form granted by the district court. We conclude that, vis á vis the City of Baltimore, while HEW may have committed other errors — a question that we may not presently properly decide — it has not acted in excess of the statute. Accordingly, federal jurisdiction was lacking and no relief should have been awarded.

A. *Generally.*

As we have already indicated, HEW, or any other agency subject to Title VI, must follow a progression before federal aid may be terminated, spelled out, in part, in the text of § 602 and fixed, in part, by the agency's regulations which § 602 authorizes and directs the agency to promulgate. Section 602 states that termination must be preceded by administrative hearings which, in turn, must be preceded by efforts at achieving voluntary compliance through negotiation and consultation. 42 U.S.C. § 2000d-1.

Faithful to the mandate of § 602, HEW has promulgated a detailed regulation codified in 45 C.F.R. Part 80. The regulation applies to "any program for which federal financial assistance is authorized to be extended to a recipient under a law administered by [HEW]," including all of the financial assistance for various educational programs outlined in an appendix to Part 80. 45 C.F.R. § 80.2. The regulation also enumerates proscribed acts of discrimination, requires assurances of equal treatment before any grant is awarded, and

gives illustrative examples of how certain deficient programs can be corrected and brought into compliance with the statute. 45 C.F.R. §§ 80.3, 80.4, 80.5.

Most important (for purposes of this appeal), the regulation requires HEW officials to seek the cooperation and aid of recipients in bringing about compliance and "to help [recipients] comply voluntarily" with Title VI and HEW specifications. 45 C.F.R. § 80.6(a). If investigation by HEW indicates noncompliance, HEW must resolve the matter "by informal means whenever possible." 45 C.F.R. § 80.7(d)(1). Administrative hearings are initiated only when efforts at voluntary compliance break down, in accord with the statute itself. 45 C.F.R. §§ 80.8-80.11.

A significant aspect of the effort to facilitate voluntary compliance is the requirement that HEW officials instruct recipients how to comply:

> (b) *Forms and instructions.* The responsible Department officials shall issue and promptly make available to interested persons forms and detailed instructions and procedures for effectuating this part [*i.e.*, 45 C.F.R. Part 80]. 45 C.F.R. § 80.12(b).

Pursuant to this self-imposed obligation, HEW has published an elaborate set of guidelines governing Title VI compliance by elementary and secondary schools. 45 C.F.R. §§ 80.4(c) and 181; *Alabama State Teachers Ass'n v. Alabama Public School & College Authority*, 289 F. Supp. 784, 787 n.3 (M.D. Ala. 1968), *summarily aff'd*, 393 U.S. 400, 89 S. Ct. 681, 21 L. Ed. 2d 631 (1969). It has failed, however, to take comparable action with respect to higher education.

B. *The State of Maryland.*

HEW's compliance efforts with respect to Maryland are directed solely to Maryland's system of higher education; specifically, the various branches of Maryland's college and university system. HEW's failure to adopt guidelines applicable to higher education in Maryland has two vital effects. First, in a practical

sense, HEW's omission completely undermines the effectiveness of any effort towards Title VI compliance, either through negotiation or through administrative hearings. Neither party, nor the administrative law judge, has any working knowledge of what constitutes "compliance," thereby reducing the entire process to a meaningless exchange of theory rather than a determination of fact. Second, in a legal sense, HEW's failure renders its action to terminate financial assistance, taken to enforce Title VI vis á vis the State, *ultra vires* and without the force of law.

Our conclusion that HEW's failure renders its beginning administrative termination proceedings *ultra vires* stems from the following reasons. The statute requires negotiations looking to voluntary compliance as a first step. It also requires that the appropriate federal agency (here HEW) promulgate regulations to that effect. HEW has complied by adopting 45 C.F.R. Part 80, and binding itself (by virtue of § 80.12(b)) to assist in voluntary compliance and to facilitate negotiations through the issuance of "compliance guidelines" or instructions. With regard to higher education, it has failed to do so, and thus it has violated its own regulation.[6] Since the regulation, in turn, was adopted pursuant to a statutory mandate, we think that the regulation is elevated to the status of the statute and violation of the regulation becomes a violation of the statute itself. Since HEW has forced the State through negotiations and into the administrative hearings without the guidelines which the statute thus requires, HEW's conduct is clearly *ultra vires* and subject to prior restraint. We discuss, at a later point what form the prior restraint should take.

[6] This, in and of itself, contradicts a legal principle to which this circuit has long adhered. Federal agencies will be held to strict compliance with their own regulations and rules of procedure, when a failure to observe them results in prejudice to a party they were designed to protect. *EEOC v. General Electric Co.*, 532 F.2d 359, 371 and n.37 (4 Cir. 1976); *McCourt v. Hampton*, 514 F.2d 1365, 1370 (4 Cir. 1975); *United States v. Heffner*, 420 F.2d 809, 811-12 (4 Cir. 1970).

C. *The City of Baltimore.*

The City of Baltimore stands on a different footing from the State. Baltimore's compliance with Title VI is sought with respect to primary and secondary schools, the subject of detailed treatment by existing HEW guidelines and directives.[7] Nonetheless, the district court concluded that, with respect to Baltimore City, relief was warranted because of the quality and quantity of HEW's negotiating efforts. In addition, the district court criticized HEW's systematic approach to school desegregation and its failure to negotiate on a school-by-school or program-by-program basis. Thus, the district court concluded that HEW had acted *ultra vires,* that it had jurisdiction, and that it was proper to decree a prior restraint against further proceedings.

The quantity or quality of negotiations by HEW requires little comment. The record reveals that there were extensive negotiations extending over a two year

[7] Even without the guidelines, the City's obligations are far clearer than those of the State. With respect to elementary and secondary schools, desegregation efforts are governed by *Brown v. Bd. of Education,* 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955) and its progeny. These cases, in and of themselves, establish "guidelines" that are unambiguous and direct. The legal responsibility of Baltimore City, under the Fourteenth Amendment, is "to come forward with a [desegregation] plan that promises realistically to work, and promises realistically to work *now.*" *Green v. School Board of New Kent County,* 391 U.S. 430, 439, 88 S. Ct. 1689, 1694, 20 L. Ed. 2d 716 (1968). (Emphasis in the original.) This is because "the obligation of every school district is to terminate dual school systems at once and to operate now and hereinafter only unitary schools." *Alexander v. Holmes County Board of Education,* 396 U.S. 19, 20, 90 S. Ct. 29, 24 L. Ed. 2d 19 (1969).

The situation with respect to Maryland is far more complex. In particular, we note the problems associated with institutions such as Morgan State University, which is predominantly black due to the voluntary self-selection of its student body. Black colleges serve a distinct social and cultural role, as suggested by the testimony given before the district court. It is apparent, therefore, that guidelines are needed most in the field of higher education, a field HEW has unjustifiably chosen to ignore.

period.[8] The record suggests that if any party was responsible for the various delays and the ultimate breakdown of communication, it was more likely the City. Nonetheless, we note that nothing in the language of Title VI or HEW's own regulation specifies the quantity or quality of attempts to negotiate voluntary compliance. Therefore, we decide only that the quantity and quality of the negotiations are not reviewable now; we do not pass on the question of whether the negotiations are reviewable at another time and, if so, whether the instant negotiations were substandard. The district court's judgment, based upon a lengthy review of the facts and its own assessment of blame for the impasse which has been reached, should not have been made. The doctrine exemplified by *Leedom* and *Taylor,* creating an exception to the general rule against prior restraint of reviewable administrative action, is a narrow one confined to conduct that is clearly *ultra vires. Boire v. Greyhound Corp.,* 376 U.S. 473, 481-82, 84 S. Ct. 894, 11 L. Ed. 2d 849 (1964).[9] Factual judgments of the type reached by the district court should be made first, if at all, by the administrative tribunal (subject, of course, to ordinary channels of judicial review).

There remains for consideration the contention that HEW violated Title VI, and acted *ultra vires,* by failing to negotiate with the City on a school-by-school or a program-by-program basis. This same contention was raised in Maryland's case, but in view of our basis of

[8] *See* note 1, *supra.*

[9] *See Wolf Corporation v. SEC,* 115 U.S. App. D.C. 75, 317 F.2d 139, 143 (1963):

> [E]xcept in very *unusual and limited* circumstances Congress did not contemplate a grant of jurisdiction to the courts to prevent abuse or misuse of power by prior restraint of the exercise of the powers [of administrators] . . . . [S]uch relief is to be *very sparingly* applied and is limited to cases where on its face the contemplated hearing or other administrative process, if consummated, would be set aside on review on procedural grounds. *Id.* (Emphasis added.)

decision we found it unnecessary to discuss it there. This contention is grounded upon § 602 of the Act, which provides, *inter alia*, that any termination or refusal of federal financial assistance

> be limited to the particular political entity, or part thereof, or other recipient as to whom . . . a finding [of noncompliance] has been made and, *shall be limited in its effect to the particular program, or part thereof, in which such non-compliance has been so found* . . . 42 U.S.C. § 2000d-1 (emphasis added).

We do not view § 602 as requiring negotiations on a programmatic basis. Its language is directed solely to the issue of remedy, once negotiations have failed and a finding of noncompliance has been made (after administrative proceedings with full opportunity to be heard). Title VI is a remedial rather than a punitive statute. It was designed to eliminate the financial participation of the federal government in illegal discrimination.[10] At the same time, because federal aid has taken on increased significance in the funding of public education, it provides an economic incentive to end discrimination without resort to the judicial

[10] In discussing the thrust of Title VI, Senator Pastore noted that:

> In the House, a concerted attack was made on title VI as "punitive" or "vindicative." These charges are undeserved. These characterizations appear to result from a belief that title VI is intended to deny the South the benefit of social welfare programs — that it would punish entire States for any act of discrimination committed within them. This argument merely befogs the issues. It ignores both the purposes of title VI and all of the limitations that have carefully been written into its language.
>
> As is clear, the purpose of title VI is to make sure that funds of the United States are not used to support racial discrimination.

110 Cong. Rec. 7062 (1964), as quoted in *Bd. of Public Instruction of Taylor County, Fla. v. Finch*, 414 F.2d 1068, 1075 n.11 (5 Cir. 1969).

process.[11] Section 602, as we view it, provides limitations on the cutoff of federal funds designed to implement the statute's remedial nature. Once a finding of noncompliance has been made, funds are terminated only to the extent that they are used in, or support

[11] Indeed, the entire Civil Rights Act of 1964 was adopted in response to the weakness of civil rights enforcement via piecemeal litigation in the federal courts.

> [I]n the last decade it has become increasingly clear that progress has been too slow and that national legislation is required to meet a national need which becomes ever more obvious. That need is evidenced, on the one hand, by a growing impatience by the victims of discrimination with its continuance and, on the other hand, by a growing recognition on the part of all our people of the incompatibility of such discrimination with our ideals and the principles to which this country is dedicated. . . . H.R. 7152 [ultimately, the Civil Rights Act of 1964], as amended, . . . is designed as a step toward eradicating significant areas of discrimination on a nationwide basis.

H.R. Rep. No. 914, to accompany H.R. 7152, [1964] U.S. Code Cong. & Admin. News pp. 2391, 2393.

> Title VI, in particular, was necessary to rescue school desegregation from the bog in which it had been trapped for ten years. The Civil Rights Commission, doubtless better able than any other authority to understand the significance of the Civil Rights Act of 1964, had this to say about Title VI: This statute heralded a new era in school desegregation. . . . Most significantly . . . Federal power was to be brought to bear in a manner which promised speedier and more substantial desegregation than had been achieved through the voluntary efforts of school boards and district-by-district litigation. . . . With [federal] funds of such [great] magnitude at stake, most school systems would be placed at a serious disadvantage by termination of Federal assistance.

United States v. Jefferson County Bd. of Education, 372 F.2d 836, 856 (5 Cir. 1966), *aff'd in banc as modified*, 380 F.2d 385, *cert. denied sub nom., Caddo Parish School Bd. v. United States*, 389 U.S. 840, 88 S. Ct. 67, 19 L. Ed. 2d 103, *rehearing denied sub nom., East Baton Rouge Parish School Bd. v. Davis*, 389 U.S. 965, 88 S. Ct. 324, 19 L. Ed. 2d 382 (1967), quoting from the Report of the U.S. Commission on Civil Rights, Survey of School Desegregation in the Southern and Border States — 1965-66, p.2.

programs which practice discrimination. Other programs or activities free from the taint of unequal treatment, may not be condemned along with the blameworthy. Federal funds flowing to these programs and to their innocent beneficiaries, must not be terminated.

Board of Public Instruction of Taylor County, Fla. v. Finch, 414 F.2d 1068 (5 Cir. 1969), relied upon the district court, does not mandate programmatic negotiation. Indeed, it supports the view of § 602 which we now take. In that case, HEW found, after appropriate hearings, that a local school district maintained racially identifiable schools and a segregated faculty. The agency proceeded to terminate all federal funds flowing from it to the district in question. HEW made no determination whether its order should have been restricted to one or more programs receiving federal funds (rather than blindly extending termination to all classes of activity benefiting from federal financial assistance).

The court held that under a proper reading of § 602, the burden of limiting the effects of termination of federal funds rested on HEW, and that HEW was required to tailor its sanction only to those programs found to be infected by discrimination.

As we read *Taylor County*, its rationale depends upon the premise, with which we agree, that the "programmatic limitation" of § 602 applies *solely* to the findings which HEW may make as to the need for sanctions and the termination which HEW may order, but it has no application to the method by which HEW shall seek to negotiate voluntary compliance. Indeed, *Taylor County* almost decides the instant case, because, in dealing with HEW's argument that § 602 imposed no duty on it to make findings of fact for each program but rather created an affirmative defense to the recipient to show that some programs were untainted, the court stated:

> The argument that the statute speaks not to the administrative agency terminating funds, but to the political entity whose funds are threatened, runs afoul of the language of the statute itself. *The statute speaks to the "effect" of an order, not to its prerequisites.* It states that termination "shall be limited *in its effect* to the particular program, or part thereof, in which such noncompliance has been so found." 414 F.2d at 1076. (Emphasis supplied in part.)

Later in its opinion, it made two additional statements which are relevant here:

> Limitations on the termination power are not primarily for the benefit of the political agency whose funds are withheld, but for the potential recipients of federal aid. 414 F.2d at 1077.
>
> * * * * * *
>
> [T]he administrative agency seeking to cut off federal funds must make findings of fact indicating either that a particular program is itself administered in a discriminatory manner, or *is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory.* Only in this way can a reviewing court know that the effects of the order entered by the agency have been limited to programs not in compliance with the Civil Rights Act. 414 F.2d at 1079. (Emphasis supplied.)

Thus, we are persuaded that HEW had no obligation to negotiate voluntary compliance on a programmatic basis as a condition precedent to the initiation of administrative termination hearings. It therefore did not act *ultra vires* in failing so to negotiate.

While we do not question that Baltimore City (and the State of Maryland) would prefer to negotiate on a programmatic basis, the law does not require it. The prior restraint should not have been granted and the administrative hearings should have been allowed to proceed. By the same token, we think that it would be inappropriate for us to express any view on HEW's alternative contention that *Taylor County* places an unjustifiably restrictive view on the meaning of a terminable "program" under § 602. Note, *Board of Public Instruction v. Finch:* Unwarranted Compromise

of Title VI's Termination Sanction, 118 U. of Pa. L. Rev. 1113 (1970).

D. *Relief in Maryland's Case.*

Although purporting to be a preliminary injunction, the decree entered by the district court effectively terminates the litigation. We do not fault the district court on that score, but we think that the decree it entered must be revised to accomplish two purposes: first, to make it conform to the specific duty imposed on HEW that we conclude has not been carried out, and, second, to fix a timetable in which HEW should and must bring itself into compliance with its own regulation and proceed with the enforcement of Title VI. With regard to the latter, the district court, while enjoining HEW from proceeding with the administrative hearings until HEW had taken certain affirmative steps, fixed no time schedule in which HEW should proceed with the enforcement of Title VI against Maryland if HEW persists in the conclusion, which it has already reached, that Maryland is not in compliance with the statute. With regard to a timetable, we take our cue from the order entered April 1, 1977 by the United States District Court for the District of Columbia in *Adams v. Califano,* 430 F. Supp. 118 (D.D.C. 1977).[12]

[12] *Adams v. Califano,* Civ. Action No. 3095-70 (D.C.C. April 1, 1977) is the latest chapter in a related proceeding brought in our sister circuit. *Adams v. Richardson,* 351 F. Supp. 636 (D.D.C. 1972); *Adams v. Richardson,* 356 F. Supp. 92 (D.D.C.), *aff'd as modified,* 156 U.S. App. D.C. 267, 480 F.2d 1159 (1973); *Adams v. Weinberger,* 391 F. Supp. 269 (D.C.C. 1975).

In *Adams,* suit was brought for declaratory and injunctive relief against the Secretary of HEW. The complaint alleged that HEW had done little or nothing to enforce Title VI since its adoption. The district court agreed, and, subject to some modification on appeal, HEW was ordered to undertake specific steps, vis á vis specific states and school districts, in order to effectuate Title VI compliance. The latest order issued in the *Adams* case, that of April 1, 1977, recognizes that any attempt to enforce Title VI in the area of higher education depends on a fundamental definition of compliance with the statute. Accordingly, the order requires HEW to draft higher education guidelines before any enforcement activity ensues (*i.e.,* either negotiation or administrative hearings).

Thus, we think that the revised decree to be entered by the district court should order:

> 1. HEW to cease and desist from initiating or taking any steps towards the initiation of any and all administrative proceedings with respect to alleged noncompliance by the State of Maryland with Title VI, or HEW regulations promulgated thereunder, until the following conditions set forth in paragraphs 2 through 4 have been fulfilled.
>
> 2. HEW, within 90 days from the date of the district court's order, to transmit to the State of Maryland, and to serve upon the district court, final guidelines or criteria specifying the ingredients of an acceptable higher education desegregation plan for Maryland.
>
> 3. HEW to require Maryland to submit, within 60 days of receipt by Maryland of the final guidelines or criteria, a revised desegregation plan.
>
> 4. HEW to accept or reject such submission by Maryland within 120 days thereafter.

The order should further provide that, during the periods of time subsequent to HEW's fulfillment of paragraph 2 hereof and until compliance by Maryland with Title VI has been achieved, nothing contained therein shall be construed to relieve the parties of their obligation, under Title VI and HEW regulations, to negotiate to effect voluntary compliance by Maryland. The order should further provide that if Maryland shall have failed to submit a revised desegregation plan by the date specified in paragraph 3 of the order, the preliminary injunction therein granted shall automatically be vacated.

No 76-1493 REVERSED.

No. 76-1494 VACATED AND REMANDED.

WIDENER, Circuit Judge, concurring in part and dissenting in part:

I would affirm the injunctions entered by the district court in both cases under review, for somewhat different reasons than have heretofore been expressed.

In its Title VI enforcement efforts in these cases, the Department of HEW has attempted to negotiate school desegregation plans with the broad remedial discretion of a district court acting under the Fourteenth Amendment. See *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971). In so doing, the agency has, in my view, failed to comply with a basic statutory prerequisite to Title VI enforcement proceedings, the prescription that "termination" of funds be "effected" only after a finding of a "failure to comply with such requirements," meaning, of course, with "rules, regulations, or orders of general applicability," which are not effective until approved by the President. Title VI, § 602, 42 U.S.C. § 2000d-1.

This statutory language manifests at least three distinct and important concerns of Title VI; that requirements of uniform, nationwide applicability be adopted;[1] that these requirements be issued under the direct authority and approval of the President, who is in immediate contact with the political process and directly accountable to the public; and that compliance efforts be confined to violations of "such" (see § 2000d-1) specific rules, regulations, or orders, thus avoiding what the majority opinion terms "a meaningless exchange of theory rather than a determination of fact."

[1] Section 2000d-6 of Title VI clearly expresses Congress' desire to achieve nationwide standards of uniform applicability:

> "(a) It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 and section 182 of the Elementary and Secondary Education Amendments of 1966 dealing with conditions of segregation by race, whether de jure or de facto, in the schools of the local educational agencies of any State shall be applied uniformly in all regions of the United States whatever the origin or cause of such segregation.
> "(b) Such uniformity refers to one policy applied uniformly to de jure segregation wherever found and such other policy as may be provided pursuant to law applied uniformly to de facto segregation wherever found."

It is apparent that such a "meaningless exchange of theory" has occurred on both the City and State levels here, because of HEW's failure both to promulgate identifiable Title VI requirements, and to confine its compliance efforts to insistence on conformity with properly adopted nationwide standards. This failure constitutes, in both cases, the type of clear violation of a statutory mandate that will justify injunctive relief without resort to an exhaustion of administrative remedies. *Leedom v. Kyne*, 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210 (1958).

I.

State of Maryland

Little more need be said of HEW's approach to higher education under Title VI. The agency had clearly failed to promulgate "rules, regulations, or orders of general applicability" with respect to state systems of higher education. HEW's Title VI regulations scarcely mention higher education, and even then say little more than that an assurance of compliance with unspecified, regulatory "requirements" must be provided. 45 C.F.R. § 80.4(a), (d). I am not as troubled as the majority by the lack of informal guidelines on the subject, a fact it obviously deems significant;[2] the more basic problem for me lies in the lack of [illegible]ally adopted, nationally uniform, standards [illegible]y the President. This lack of statutorily [illegible]egulations justified the district court in issuin[illegible]njunction despite the State's failure to exhaust ad[illegible]inistrative remedies.[3] See *Leedom*, supra.

[2] During the pendency of this appeal, HEW has in fact issued informal guidelines for the desegregation of State systems of higher education, pursuant to an order of the United States District Court for the District of Columbia in *Adams v. Califano*, 430 F. Supp. 118 (D.D.C. 1977).

The guidelines do not apply to the State of Maryland, because of the pendency of this litigation.

[3] My agreement with the majority's affirmance in No. 76-1494 does not extend to its modification of the district court's injunction, from which modification I respectfully dissent. I

II.

City of Baltimore

HEW has issued regulations of general applicability with respect to primary and secondary schools. In 45 C.F.R. § 80.4(c), the regulation applicable to this case, HEW has stated that a school system will be deemed in compliance with Title VI if it "(2) submits a plan for the desegregation of such school or school system which the responsible Department official determines is adequate to accomplish the purposes of the Act and this part, at the earliest practicable time, and provides reasonable assurance that it will carry out such plan. . . ."

This regulation fails to identify to any meaningful extent when a school system is not in compliance with Title VI, and what it must do to achieve compliance. Rather, it vests in HEW a broad remedial discretion in defining an acceptable desegregation plan, the exercise of which can only result in different standards of compliance with Title VI on a case by case basis. That is not what § 2000d-1 contemplates. If requirements are to be imposed, the violation of which can result in a termination of federal financial aid, they must be in the form of publicly issued rules, regulations or orders of nationwide applicability, approved by the President.[4]

Judged by this standard, which is required by statute, the regulation applied in this case, 45 C.F.R. § 80.4(c)(2), cannot be viewed as adequate. It sets no identifiable,

think the administration of Title VI is a matter better left in the hands of the executive branch, here HEW, assuming it complies with the statute, than a federal appeals court.

[4] The issue of whether Title VI obligations can be imposed which are not adopted by rules, regulations, or orders of general applicability, approved by the President, was not raised or considered in *Taylor v. Cohen*, 405 F.2d 277 (4th Cir. 1968) (en banc). That case is therefore not controlling here. *United States v. Mitchell*, 271 U.S. 9, 46 S. Ct. 418, 70 L. Ed. 799 (1926); *Webster v. Fall*, 266 U.S. 507, 45 S. Ct. 148, 69 L. Ed. 411 (1925).

uniform standards of compliance with Title VI, only the hopelessly vague standard of what HEW deems "adequate to accomplish the purposes of the Act." It is the content of this phrase — what HEW in substance deems "adequate" — that must be expressed in generally applicable regulations issued in an open and public manner. Only then will determinations of compliance reach the level of objectivity contemplated by Title VI.

The record in these cases supports the inescapable conclusion that, from the inception of HEW's Title VI enforcement effort against Maryland and Baltimore City, beginning with *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973), aff'd. as modified, 480 F.2d 1159 (D.C. Cir. 1973), the central, and really the only, theme has been the attainment of a racial balance in schools in which more than a 20% disproportion exists between minority enrollment and minority population in the entire school district,[5] which in Baltimore is 70%.

Thus, in its Amended Notice of Opportunity for Hearing, setting forth enumerated grounds of noncompliance with Title VI on the part of Maryland and Baltimore City, HEW charged that 109 of the 210 public schools in Baltimore "had disproportionate minority enrollments in that they were greater than 90% minority," and that 51 schools "had disproportionate white enrollments, in that they were less than 50% minority."

[5] This is indicated clearly by correspondence found in the record between OCR Director Peter Holmes and Superintendent Patterson of the Baltimore School System. A letter from Holmes to Patterson dated April 17, 1973 states that if Baltimore had no schools in which a "20% disproportion" existed, the system would be unaffected by the order of the District of Columbia District Court in *Adams v. Richardson*, supra. If, however, one or more such schools was in operation, the city was called upon to submit to OCR "all relevant data and demographic and other information . . . concerning each of the schools in your district in which a '20% disproportion' exists, which would explain that disproportion or otherwise indicate your district's compliance with existing law."

The validity or applicability of such racial quotas in school desegregation cases need not be debated here. Cf. *Swann*, supra. It suffices for present purposes to observe that at no time has HEW incorporated such quotas, even in general terms, into a regulation of general applicability, approved by the President, as Title VI requires. If quotas at all, or a 20% disproportion, are to be the Title VI standards in school cases, it must be so for the entire nation, not just for the City of Baltimore.

For these reasons, I would hold that HEW acted *ultra vires* in its dealings with Baltimore City in No. 76-1493, and I respectfully dissent from the opinion of the majority in that case.

Judges DONALD RUSSELL and K. K. HALL have authorized me to state that they concur in this opinion. Judge K. K. Hall has also asked me to state that he reserves the right to express further his separate views.

K. K. HALL, Circuit Judge, concurring in part and dissenting in part:

I.

STATE OF MARYLAND

As to the State of Maryland (Appeal No. 76-1494), I concur with that portion of the majority opinion which holds in substance that HEW acted *ultra vires* due to its failure to adopt guidelines for Title VI compliance by institutions of higher education in Maryland, thereby rendering the voluntary and administrative compliance phases of the Title VI enforcement a "meaningless exchange of theory rather than a determination of fact."

I dissent from the failure of the majority to also hold that HEW must utilize a programmatic approach to voluntary compliance with the State of Maryland prior to initiation of administrative enforcement and from

the *dictum* in Part II.C. of the majority opinion which implies that HEW has no such duty.

I further dissent from the relief which the majority holds is proper for the State of Maryland. In lieu thereof, I would affirm the injunction entered by the district court.

II.

CITY OF BALTIMORE

As to the City of Baltimore (Appeal No. 76-1493), I dissent from the majority opinion which narrowly holds that § 602 of Title VI, 42 U.S.C. § 2000d-1, alone does not require a programmatic analysis of alleged Title VI noncompliance during voluntary negotiations prior to initiation of administrative enforcement proceedings, and which therefore holds that HEW did not act *ultra vires* by its conduct up to and including the commencement of administrative enforcement.

I further dissent from the reversal of the injunction entered in favor of the City of Baltimore, and instead would also affirm the injunction entered by the district court.

III.

PROGRAMMATIC APPROACH

Under Title VI, 42 U.S.C. § 2000d, *et seq.*, and the applicable regulations, 45 C.F.R., Parts 80 and 81, the compliance procedures are divided into three phases: (1) the voluntary compliance phase; (2) the administrative hearing phase; and (3) the phase when actual fund termination occurs. I would hold that under Title VI, HEW must, at each of the three phases, specify with particularity, to the extent reasonably possible, each program or programs that it believes to be out of compliance with Title VI.

I believe this result is compelled by the statutory and regulatory framework of Title VI, its legislative history, by precedent, and certainly by logic itself. Since HEW admittedly did not follow a programmatic analysis

during the voluntary enforcement stage and prior to its efforts to seek and to pursue administrative enforcement seeking termination of all federal funding with respect to the State of Maryland and the City of Baltimore respectively, I would hold that the district court correctly assumed jurisdiction in both civil actions filed by the State and the City, respectively, under the established exception to administrative exhaustion doctrine set forth in *Leedom v. Kyne*, 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210 (1958); *see also Taylor v. Cohen*, 405 F.2d 277, 281 (4th Cir. 1968).

When the entire statutory and regulatory framework of Title VI is closely analyzed, it is clear that a programmatic approach to Title VI compliance must be followed in all phases of compliance.[1] The congressional prohibition against discrimination supports this view:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination *under any program or activity* receiving Federal financial assistance.

42 U.S.C. § 2000d (emphasis added).

The parallel regulation contains similar emphasis barring ". . . discrimination under *any program or activity* receiving Federal financial assistance from [HEW]." 45 C.F.R. § 80.1 (emphasis added).

The compliance section of Title VI and its parallel regulation similarly require voluntary compliance by the parties in an effort to end discrimination in programs receiving federal funding, and failing in that,

[1] The definition of "program" is discussed in *Board of Public Instruction of Taylor County, Florida v. Finch*, 414 F.2d 1068, 1076-79 (5th Cir. 1969). Rather than meaning an entire school program, as HEW argued, its meaning can be reduced to an individual grant that finances a project or activity, no matter how few people are involved. *See also* 45 C.F.R. § 80.13(g) (1976).

termination provisions for such funding are provided. Again, these provisions are ". . . limited to the particular political entity, or part thereof, or other recipient as to whom such a[n] [administrative finding of discrimination] has been made and, *shall be limited* in its effect *to the particular program, or part thereof,* in which such noncompliance [with Title VI] has been so found, ..." 42 U.S.C. § 2000d-1 (emphasis added); 45 C.F.R. § 80.8(c).

Further, the applicable law provides, in 45 C.F.R. § 80.2 that "[t]his regulation applies to *any program* for which Federal financial assistance is authorized to be extended to a recipient under a law administered by [HEW-45 C.F.R. § 80.13(a)], *including the Federal assisted programs and activities* listed [as] Appendix A of this regulation." (emphasis added). That Appendix comprehensively lists 186 areas wherein federal monies are either made available as part of a federal program (such as for research and related activities in education of handicapped children — 20 U.S.C. § 1441 — or for college work-study programs — 42 U.S.C. §§ 2751-2757) or as part of continuing federal assistance to state administered programs (such as grants to states for vocational work-study programs — 20 U.S.C. §§ 1371-1374). Indeed, a fair reading of the entire statutory and regulatory scheme bespeaks of a programmatic analysis in Title VI cases.[2]

Precedent also supports the programmatic approach required in Title VI cases. Contrary to the majority in this case, I believe the holding in and the spirit of *Board of Public Instruction of Taylor County, Fla. v.*

[2] It has long been settled that "[s]tatutes which relate to the same person or thing, or to the same class of persons or things, or which have a common purpose are in pari materia, and it is a general rule that in the construction of a particular statute, or in the interpretation of its provisions, all other statutes in pari materia should be read in connection with it, as together constituting one law, and they should be harmonized, if possible." 82 C.J.S. *Statutes* § 366 (1953).

Finch, 414 F.2d 1068 (5th Cir. 1969), require a programmatic analysis both during voluntary negotiation and later during the administrative compliance phase.

In the *Finch* case, Taylor County, Florida, received federal funds for use in its educational system under a number of federal grant statutes, e.g., Title II, Elementary and Secondary Education Act of 1965, 20 U.S.C. § 241a-m; P.L. 89-750, Basic Education for Adults, 20 U.S.C. §§ 1201-1213; and Title III, Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 841-848. A HEW hearing examiner, however, concluded that the Taylor County School Board was in violation of Title VI and therefore ordered that federal funds to the district be terminated. But the order was not:

> . . . programmatically oriented, at least if the term "program" is understood to refer to the individual grant statutes under which aid was given to the Taylor County School District. . . . the termination of federal funds is not "limited in its effect" to one or more federally financed activities described in the grant statutes, but extends to "any classes of Federal financial assistance arising under *any Act of Congress*. . . .

414 F.2d at 1072 (emphasis in the original). The Court of Appeals reversed the HEW hearing examiner's order holding that:

> HEW was denied the right to condemn programs by association. The statute prescribes a policy of disassociation of programs in the fact finding process. *Each must be considered on its own merits to determine whether or not it is in compliance with the Act.* In this way the Act is shielded from a vindictive application. Schools and programs are not condemned enmasse or in gross, with the good and the bad condemned together, but the termination power reaches only those programs which would utilize federal money for unconstitutional ends. Under this procedure, each program receives its own "day in court".

414 F.2d at 1078 (emphasis added).

While the court in *Taylor County* did focus on the termination stage of the proceedings, there is no rational basis for distinguishing that stage of the proceedings from the voluntary compliance stage of the proceedings. This follows since the underlying thrust of Title VI requires HEW first to secure voluntary compliance eliminating discrimination if such a method is reasonably possible. 42 U.S.C. § 2000d-1; 45 C.F.R. §§ 80.6(a) and 80.8(c); *Adams v. Richardson*, 351 F. Supp. 636, 641-642 (D.D.C. 1972); *modified and aff'd*, 156 U.S. App. D.C. 267, 480 F.2d 1159, 1163 (1973); *Board of Public Instruction of Taylor County, Fla. v. Finch, supra* at 1075, n.12; 1964 *U.S. Code Cong. and Admin. News*, at p. 2512; Remarks of Senator Pastore, 110 Cong. Rec. 7061 (1964); *see also Taylor v. Cohen*, 405 F.2d 277, 279 (4th Cir. 1968).

Explicit in any scheme of voluntary compliance is negotiation, *Adams v. Richardson*, 351 F. Supp. 636, 641 (D.D.C. 1972), 45 C.F.R. § 80.7(d), and for meaningful negotiations to occur one must know what he is charged with in order to discuss his position intelligently. This allows the party charged with a Title VI violation to remedy the situation voluntarily. And many cases can be, and indeed should be, settled at this stage. Also, this spares the non-discriminating programs the wasteful counterproductive and unnecessary expense that attaches to being blindly drawn into an administrative proceeding that should not ultimately affect it anyway. It likewise dispenses with the harsh result that attends *en masse* terminations of federal assistance when wholesale cut-off of funding deprives those of federal funds who need them the most *and* whom Title VI was designed to protect.[3] *See Board of*

[3] Federal funds are necessary to support the State's schools of: medicine, dentistry, nursing, and pharmacy. The Baltimore Cancer Research Center is similarly dependent. Much of this federal aid goes directly to minority students through student loans, work-study and grants. *Mandel v. U.S. Dept. of Health, Education and Welfare*, 411 F. Supp. 542, 560-61.

Public Instruction of Taylor County, Fla. v. Finch, supra at 1075; United States Commission on Civil Rights, *A Generation Deprived, Los Angeles School Desegregation,* Chapter VIII, pp. 168-194 (1977); Remarks of Senator Pastore, 110 Cong. Rec. 7061 (1964).

Thus, the enforcement during the voluntary compliance phase in Title VI cases on a non-programmatic basis renders that statute, so applied, to be punitive in nature — a result Congress clearly did not intend. *Id., 1964 U.S. Code Cong. and Admin. News,* p. 2512; Remarks of Senator Pastore, 110 Cong. Rec. 7061-7063 (1964).

I further believe that the extensive legislative history reflected debates on the floor of Congress supports the requirement of a programmatic analysis during the voluntary compliance phase in Title VI cases.

Senator Pastore observed that:

> Title VI is not a device to terminate all federal aid to a state or community because there has been discrimination in one specific program. Therefore, the nondiscrimination requirements must relate directly to the particular program or activity against which they are imposed. Participation in one program would not justify the exaction of a nondiscrimination assurance concerning some other program. Similarly, any fund cut-off, or similar action, can be taken only concerning a program or activity in which discrimination has been practiced. *Only the program in which discrimination has been practiced would be affected by Title VI.*

88 Cong. Rec. 7059 (1964) (emphasis added).

City programs affected by such a federal fund cut-off would be widely varied. They would include: "summer programs for exceptional and socially deprived children; staff development; programs for handicapped children; parent training; library resources; sickle cell anemia; projects for reading; science mathematical and vocational education; and work-study for low income students." *Id.,* at 561.

In response to comments by Senator Ribicoff, Senator Pastore added that:

> . . . *the purpose of Title VI is not to cut off funds but to end racial discrimination.* This requirement is reflected throughout the act. It is reflected in section 602 [42 U.S.C. § 2000d-1] which provides that any section taken by the Federal department or agency must be "consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." *As a general rule, cutoff of funds would not be consistent with the objective of the Federal assistance statutes if other effective means of ending discrimination are available.*
>
> Section 602 [42 U.S.C. § 2000d-1], by authorizing the agency to achieve compliance *"by any other means authorized by law," encourages agencies to find ways to end discrimination without refusing or terminating assistance.* These careful safeguards certainly demonstrate that the proposed statute is not intended to be vindictive or punitive.

88 Cong. Rec. 063 (1964) (emphasis added).

The commentary of Senators Humphrey, Javits and Moss also support the Pastore-Ribicoff programmatic interpretation which I believe is proper. Discussing § 602 of Title VI, Senator Humphrey reviewed the desired scheme of Title VI compliance thusly:

> . . . [42 U.S.C. § 2000d-1] provides that any termination of federal assistance will be restricted to the particular political subdivision which is violating nondiscrimination regulations established under Title VI. It further provides that the termination shall affect only the *particular program, or part thereof,* in which such a violation is taking place.

88 Cong. Rec. 12714-12715 (1964) (emphasis added).

> It is my view that Title VI is consistent with the opinion of the late President [Kennedy], because it would not authorize a general wholesale cutoff for federal expenditures, regardless of the purpose for which they were being spent. *It would authorize*

action, including cutoff of funds where necessary, to end racial discrimination against the participants and beneficiaries of specific programs of federal financial assistance by way of grant, loan, or contract.

88 Cong. Rec. 8627 (1964) (emphasis added).

Senator Javits carefully noted that:

> [p]roponents of the bill have continually made it clear that, apart from all these safeguards against arbitrary action, it is the intent of Title VI not to require wholesale cutoffs of federal funds from all federal programs in entire states, but instead to require a *careful case by case* application of the principle of nondiscrimination *to those particular activities* which are actually discriminatory or segregated.

88 Cong. Rec. 7103 (1964) (emphasis added).

Finally, Senator Moss capsulized the programmatic requirement thusly:

> Involved here in Title VI is the very elementary and unassailable principle that federal funds are not to be used to support racial discrimination. Yet, before that principle is implemented to the detriment of any person, agency, or state, *regulations giving notice of what conduct is required must be drawn up by the agency administering the program. These regulations can only reach racial discrimination which relates directly to the particular purpose of the program.*

88 Cong. Rec. 6749 (1964) (emphasis added).

Beyond the statutory and regulatory framework, the precedent and the legislative history of Title VI, at least at the elementary and secondary levels of education, HEW's own forceful policy interpretation of Title VI requires a programmatic approach during voluntary negotiations toward compliance. Paragraph 22 of the pamphlet entitled *Policies on Elementary and Secondary School Compliance with Title VI of the Civil Rights Act of 1964,* issued by HEW's Office of Civil

Rights, pursuant to 45 C.F.R. §§ 80.6(a) and 80.12(b), which governs HEW's enforcement of Title VI in the elementary and secondary school systems (and which is applicable to the City of Baltimore), provides quite succinctly that:

> Where review of a school system indicates noncompliance with the Assurance of Compliance and Title VI, the *Office for Civil Rights staff will make every reasonable effort to achieve compliance through negotiation.*
>
> The *first formal step* of such negotiation *is a letter* from the Office for Civil Rights to the school system *identifying the particular areas of noncompliance,* advising the system of its responsibility to prepare and submit to the Office for Civil Rights a plan for correcting the noncompliance promptly and effectively, and offering the school system assistance and guidance on the best manner to achieve compliance. *If a school system submits a plan which is unsatisfactory in any respect, the Office for Civil Rights will inform the school system in detail and in writing of the areas in which the plan is not satisfactory.*
>
> If local officials so request, the Office for Civil Rights will at any stage of negotiation recommend in writing specific steps the school system may take to achieve compliance.

Quoted from *Mandel v. U. S. Dept. of Health, Education and Welfare,* 411 F. Supp. 542, 554 (emphasis added).

Since the policy pronouncement contained in Paragraph 22 of the OCR policy manual is merely declaratory of the programmatic approach to voluntary negotiations which I believe Title VI requires, as is set forth above, then like the district judge below, I would hold that HEW has thus failed to follow their own rules and regulations in contravention of the sound principles set out by Judge Winter in *United States v. Heffner,* 420 F.2d 809, 811 (4th Cir. 1970); *See Mandel v. U. S. Dept. of Health, Ed. and Welfare,* 411 F. Supp. 542, 553-554 (D. Md. 1976).

Finally, I believe the programmatic approach retains the proper and logical evidentiary balance regarding the burden of going forward with the evidence in cases of this nature. Ordinarily, at the outset of the administrative process, the burden of producing evidence rests upon HEW to establish the discriminatory nature of a program. 5 U.S.C. § 556(d). When the agency has made a *prima facie* case, the burden of going forward with the evidence obviously shifts.

If we were to adopt a non-programmatic approach and fail to require HEW to specify the particular program, or part thereof arguably in noncompliance, then the evidentiary roles of producing proof would illogically be reversed. This would place an unreasonable burden upon the state, city or school board to prove a negative — that is, the challenged entity, under pain of fund termination, would have to demonstrate the absence of discrimination in every program, activity and part thereof. To avoid this injustice, I would hold that HEW must "pinpoint" to the extent reasonably possible the precise program, or part thereof, which it contends is in noncompliance with Title VI. As above noted, this must be done prior to enforcement proceedings during voluntary compliance efforts.

Judge DONALD RUSSELL asks that I state that he concurs with the views expressed in my concurring and dissenting opinion.

While Judge WIDENER authorizes me to state that he concurs in this opinion, he yet believes that the reliance of the majority opinion on whether or not the Secretary must negotiate on a programmatic basis avoids discussion of the principal issue of the case.

Opinions filed February 22, 1978

(Mayor and City Council v. Mathews, 571 F.2d 1273 (4th Cir. 1978))

United States Court of Appeals
for the Fourth Circuit

No. 76-1493

Mayor and City Council of Baltimore, a Municipal Corporation and Board of School Commissioners of Baltimore City, Appellees,

v.

F. David Mathews, Individually and as Secretary of the United States Department of Health, Education, and Welfare, Martin H. Gerry, Individually and as Acting Director, Office for Civil Rights, United States Department of Health, Education, and Welfare, United States Department of Health, Education, and Welfare, an agency of the United States of America, and Irvin N. Hackerman, Individually and as Administrative Law Judge, United States Department of Health, Education, and Welfare, Appellants,

NAACP Legal Defense and Education Fund, Inc., Amicus Curiae.

No. 76-1494

Marvin Mandel, Governor of the State of Maryland, State of Maryland, Maryland State Board for Community Colleges, an agency of the State of Maryland, Maryland Council for Higher Education, an agency of the State of Maryland, Board of

Trustees of Morgan State University, an agency of the State of Maryland, Board of Trustees of St. Mary's College of Maryland, an agency of the State of Maryland, Board of Trustees of the State Colleges of Maryland, an agency of the State of Maryland, the University of Maryland, an agency of the State of Maryland, Board of Trustees of the Community College of Baltimore, an agency of the Mayor and City Council of Baltimore, on behalf of itself and all other Public Junior and Community Colleges of the various political subdivisions lying within the State of Maryland, Appellees,

v.

United States Department of Health, Education, and Welfare, an agency of the United States of America, F. David Mathews, Individually and in his official capacity as Secretary of the United States Department of Health, Education, and Welfare, Martin H. Gerry, Individually and in his official capacity as Acting Director of the Office for Civil Rights of the United States Department of Health, Education, and Welfare, Dewey E. Dodds, Individually and in his official capacity as Acting Deputy Director of the Office for Civil Rights of the United States Department of Health, Education, and Welfare, Roy McKinney, Individually and in his official capacity as Acting Director of the Higher Education Division of the Office for Civil Rights of the United States Department of Health, Education, and Welfare, Burton Taylor, Individually, and in his official capacity as Chief of the Program and Policy Branch of the Higher Education Division of the Office for Civil Rights of the United States Department of Health, Education, and Welfare, St. John Barrett, Individually and in his official capacity as Acting General Counsel of the United States Department of Health, Education, and Welfare, and Ronald Gilliam, Individually and in his official capacity as Acting Regional Civil Rights Director for Region III of the Office for Civil Rights of the United States Department of health, Education, and Welfare, Appellants,

NAACP Legal defense and Educational Fund, Inc., Amicus Curiae,

The American Council on Education, the Association of American Universities, the National Association of State Universities and Land Grant Colleges, the American Association of State Colleges and Universities and the American Association of Community and Junior Colleges, the National Association of Attorneys Generals, and the States of Alaska, Arizona, Connecticut, Delaware, Florida, Idaho, Illinois, Iowa, Kansas, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oregon, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming, and the Commonwealths of Kentucky and Virginia, Amici Curiae,

The Commonwealth of Pennsylvania, Amicus Curiae,

Trustees of the California State University and Colleges and Regents of the University of California, Amici Curiae.

Decided Feb. 16, 1978.

Before HAYNSWORTH, Chief Judge, and WINTER, CRAVEN,* BUTZNER, RUSSELL, WIDENER, and HALL, Circuit Judges, sitting *en banc.*

PER CURIAM:

Upon consideration of the appellees' petitions for rehearing and the response filed by the appellants, we conclude that Judge Craven's vote cannot be counted in the disposition of these appeals. Judge Craven died after approving Parts I and II of the opinion that Judge Winter wrote expressing the views of a majority of the court. His death occurred, however, before the dissenting and concurring opinions were written and before the court's decision was announced. Therefore, Judge Craven's approval of Judge Winter's draft cannot be tallied for the purpose of deciding the appeals. *Cf. United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, 80 S. Ct. 1336, 4 L. Ed. 2d 1491 (1960).

* Judge Craven died May 3, 1977.

Accordingly, we withdraw the opinions that were previously filed, affirm by an equally divided court the district court's orders granting preliminary injunctions, and remand the case to the district court for trial.

Regrettably, these cases have been delayed by our initial misapprehension of the effect of Judge Craven's death on their outcome. Consequently, we request the district court to try them and enter a final order as expeditiously as possible.

WINTER, Circuit Judge, concurring and dissenting:

Because there is not unanimity within the court as to whether Judge Craven, before concurring in the opinion which I prepared, was fully cognizant of, considered and rejected all the views of the dissenting judges, I agree that we should not allow our previous divided decision to stand. I disagree, however, that we should decide the case now by an equally divided court.

The case is an important one with national implications, and it reaches us at a stage in which there will inevitably be further proceedings, judicial and administrative. Even if affirmed, the cases must be returned to the district court for consideration of the prayer for a permanent injunction, unless, of course, the Secretary concludes to confess error and submit to the preliminary injunction.

The district court granted preliminary injunctions against administrative enforcement of Title VI which, although negative in character, provided that the Secretary might reinstitute administrative enforcement proceedings if (in the case of Baltimore), (a) Baltimore was informed in detail and in writing of all areas in which its present desegregation plan was deficient, (b) the Secretary recommended in writing specific steps which Baltimore might take to achieve compliance, (c) the Secretary specified each program or part of a program under which he claimed that Baltimore failed to comply with Title VI and schools at which noncompliance was believed to exist, (d) the Secretary specified

in writing the particular noncompliance in each particular program at each particular school where noncompliance was thought to exist, (e) the Secretary made a good-faith effort to obtain voluntary compliance, and (f) Baltimore was given a reasonable opportunity to achieve voluntary compliance through adoption and implementation of a voluntary remedial plan with an opportunity for community participation in the development of a remedial plan. With respect to Maryland, the comparable conditions were that (a) the Secretary promulgate and adopt specific standards for compliance with Title VI by institutions of higher education, said regulations to be of general applicability and to apply uniformly throughout the United States; (b) the Secretary made a separate and specific analysis of each and every program to determine the existence of noncompliance in the administration of the program; (c) the Secretary made a good-faith effort to achieve compliance by voluntary means in each separate program in which noncompliance is alleged to have been found; and (d) the Secretary specified, wherever noncompliance in a particular program was believed to exist, the actions necessary to remedy the alleged noncompliance and the standards by which the existence of noncompliance would be determined. Since the district court did not enjoin the Secretary from carrying out his duties under Title VI, and since Title VI requires him to take steps to achieve compliance, the preliminary injunction may be fairly construed as a mandatory injunction requiring the Secretary to take the various actions set forth in each of the two injunctions.

Although the cases were decided in the district court by the granting of a preliminary injunction, an analysis of the record and the evidence before the district court makes it clear that on remand the entry of a permanent injunction will be a *pro forma* action. From the very full record before us, it is inconceivable to me that there is additional evidence to be considered by the district court. From the opinion of the district

court, I would doubt also that its views would be dislodged on consideration of the entry of a permanent injunction.

From these considerations, I am led to the conclusion that we ought not to proceed to decide the cases on their merits by an equally divided court. Rather, a fairer and more equitable approach would be to grant rehearing and restore the cases to the hearing calendar, deferring hearing until Judge Craven's successor has been selected and qualified. I do not doubt the appropriateness of our granting rehearing in banc, but I question the wisdom of affirming by an equally divided court. Although other courts of appeals have done just that in cases of lesser importance, I would stress that here further proceedings are inevitable.

If the district court makes permanent its preliminary injunctions — a result that I fully expect — there will be an opportunity for a further appeal. Presumably that appeal will not be heard and decided by less than a full court, but in the interim the Secretary will be required to expend time and money to effect compliance with the injunction when it may well be that a majority of the full court in a second appeal will decide that such expenditures are unnecessary. Of course the effect of a permanent injunction may be stayed by the district court, or it may be stayed by us pending appeal. But even if a stay is granted, I think that we quite unnecessarily subject the parties to the formality of the entry of a permanent injunction and the expense and inconvenience of a second appeal when it is perfectly obvious that we can give no definitive answer to the basic questions presented by these consolidated appeals until there is a full court.

Order Filed February 28, 1978

United States Court Of Appeals
For The Fourth Circuit

No. 76-1493

Mayor and City Council of Baltimore, a municipal corporation; Board of School Commissioners of Baltimore City,

Appellees,

v.

F. David Mathews, individually and as Secretary of the United States Department of Health, Education and Welfare; Martin H. Gerry, individually and as Acting Director, Office for Civil Rights, United States Department of Health, Education and Welfare; United States Department of Health, Education and Welfare, an agency of the United States of America; and Irvin N. Hackerman, individually and as Administrative Law Judge, United States Department of Health, Education and Welfare,

Appellants,

NAACP Legal Defense and Education Fund, Inc.

Amicus Curiae.

No. 76-1494

Marvin Mandel, Governor of the State of Maryland; State of Maryland; Maryland State Board for Community Colleges, an agency of the State of Maryland; Maryland Council for Higher Education, as agency of the State of Maryland; Board of Trustees of Morgan State University, an agency of the State of Maryland; Board of Trustees of St. Mary's College of Maryland, an agency of the State of Maryland; Board of Trustees of the State Colleges

of Maryland, an agency of the State of Maryland; The University of Maryland, an agency of the State of Maryland; Board of Trustees of The Community College of Baltimore, an agency of the Mayor and City Council of Baltimore, on behalf of itself and all other Public Junior and Community Colleges of the various political subdivisions lying within the State of Maryland,

Appellees,

v.

United States Department of Health, Education, and Welfare, an agency of the United States of America; F. David Mathews, individually and in his official capacity as Secretary of the United States department of Health, Education and Welfare; Martin H. Gerry, individually and in his official capacity as Acting Director of the Office for Civil Rights of the United States Department of Health, Education, and Welfare; Dewey E. Dodds, individually and in his official capacity as Acting Deputy Director of the Office for Civil Rights of the United States Department of Health, Education, and Welfare; Roy McKinney, individually and in his official capacity as Acting Director of the Higher Education Division of the Office for Civil Rights of the United States Department of Health, Education, and Welfare; Burton Taylor, individually, and in his official capacity as Chief of the Program and Policy Branch of the Higher Education Division of the Office for Civil Rights of the United States Department of Health, Education, and Welfare; St. John Barrett, individually and in his official capacity as Acting General Counsel of the United States Department of Health, Education, and Welfare; and Ronald Gilliam, individually and in his official capacity as Acting Regional Civil Rights Director for Region III of the Office for Civil Rights of the United States Department of Health, Education, and Welfare,

Appellants,

NAACP Legal Defense and Educational Fund, Inc., Amicus Curiae,

The American Council on Education, The Association of American Universities, The National Association of State Universities and Land Grant Colleges, The American Association of State Colleges and Universities and The American Association of State Colleges and Universities and The American Association of Community and Junior Colleges; The National Association of Attorneys Generals; and The States of Alaska, Arizona, Connecticut, Delaware, Florida, Idaho, Illinois, Iowa, Kansas, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oregon, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming, and the Commonwealths of Kentucky and Virginia,

Amici Curiae,

The Commonwealth of Pennsylvania,

Amicus Curiae,

Trustees of the California State University and Colleges and Regents of the University of California,

Amici Curiae.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, Chief Judge.

Upon consideration of the government's motion for an extension of time within which to file petition for rehearing until March 16, 1978, by counsel,

IT IS ORDERED that the motion is granted.

For The Court — By Direction.

/s/ WILLIAM K. SLATE, II,
Clerk.

Order Filed May 15, 1978

Supreme Court of the United States

No. A-947

Blair Lee, III, Acting Governor of Maryland, Et Al.,
Petitioners,

v.

United States Department of Health, Education And Welfare, Et Al.

Order Extending Time To File Petition For Writ Of Certiorari

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 16, 1978.

s/ WARREN E. BURGER,
Chief Justice of the United States.

Dated this 15th day of May, 1978.

United States Code (1976 ed.; vol. 1, pp. 332-34), *Title 5, Sections 701-706:*

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory, or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1834, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392).

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other that money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered

against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or ciminal proceedings for judicial enforcement.

(Pub. L. 89-554. Sept. 6, 1966, 80 Stat. 392; Pub. L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as

otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392.)

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

United States Code (1970 ed.; vol. 9, pp. 10290-92), Title 42, Sections 2000d-2000d-6:

§ 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. (Pub. L. 88-352, title VI, § 601, July 2, 1964, 78 Stat. 252.)

§ 2000d-1. Federal authority and financial assistance to programs or activities by way of grant, loan, or contract other than contract of insurance or guaranty; rules and regulations; approval by President; compliance with requirements; reports to congressional committees; effective date of administrative action.

Each Federal department and agency which is empowered to extend Federal financial assistance to

any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report. (Pub. L. 88-352, title VI, § 602, July 2, 1964, 78 Stat. 252.)

§ 2000d-2. Judicial review; Administrative Procedure Act.

Any department or agency action taken pursuant to section 2000d-1 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d-1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with section 1009 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that section. (Pub. L. 88-352, title VI, § 603, July 2, 1964, 78 Stat. 253.)

§ 2000d-3. Construction of provisions not to authorize administrative action with respect to employment practices except where primary objective of Federal financial assistance is to provide employment.

Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment. (Pub. L. 88-352, title VI, § 604, July 2, 1974, 78 Stat. 253.)

§ 2000d-4. Federal authority and financial assistance to programs or activities by way of contract of insurance or guaranty.

Nothing in this subchapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty. (Pub. L. 88-352, title VI, § 605, July 2, 1964, 78 Stat. 253.)

§ 2000d-5. Prohibited deferral of action on applications by local educational agencies seeking federal funds for alleged noncompliance with Civil Rights Act.

The Commissioner of Education shall not defer action or order action deferred on any application by a local educational agency for funds authorized to be appropriated by this Act, by the Elementary and Secondary Education Act of 1965, by the Act of September 30, 1950 (Public Law 874, Eighty-first Congress), by the Act of September 23, 1950 (Public Law 815, Eighty-first Congress), or by the Cooperative Research Act, on the basis of alleged noncompliance with the provisions of this subchapter for more than sixty days after notice is given to such local agency of such deferral unless such local agency is given the opportunity for a hearing as provided in section 2000d-1 of this title, such hearing to be held within sixty days of such notice, unless the time for such hearing is extended by mutual consent of such local agency and the commissioner, and such deferral shall not continue for more than thirty days after the close of any such hearing unless there has been an express finding on the record of such hearing that such local educational agency has failed to comply with the provisions of this subchapter: *Provided,* That, for the purpose of determining whether a local educational agency is in compliance with this subchapter, compliance by such agency with a final order or judgment of a Federal court for the desegregation of the school or school system operated by such agency shall be deemed to be compliance with this sub-chapter, insofar as the matters covered in the order or judgment are concerned. (Pub. L. 89-750, title I, § 182, Nov. 3, 1966, 80 Stat. 1209; Pub. L. 90-247, title i, § 112, Jan. 2, 1968, 81 Stat. 787.)

§ 2000d-6. Policy of United States as to application of nondiscrimination provisions in schools of local educational agencies.

(a) Declaration of uniform policy.

It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil

Rights Act of 1964 and section 182 of the Elementary and Secondary Education Amendments of 1966 dealing with conditions of segregation by race, whether de jure or de facto, in the schools of the local educational agencies of any State shall be applied uniformly in all regions of the United States whatever the origin or cause of such segregation.

(b) Nature of uniformity.

Such uniformly refers to one policy applied uniformly to de jure segregation wherever found and such other policy as may be provided pursuant to law applied uniformly to de facto segregation wherever found.

(c) Prohibition of construction for diminution of obligation for enforcement or compliance with nondiscrimination requirements.

Nothing in this section shall be construed to diminish the obligation of responsible officials to enforce or comply with such guidelines and criteria in order to eliminiate discrimination in federally assisted programs and activities as required by title VI of the Civil Rights Act of 1964.

(d) Additional funds.

It is the sense of the Congress that the Department of Justice and the Department of Health, Education, and Welfare should request such additional funds as may be necessary to apply the policy set forth in this section throughout the United States. (Pub. L. 91-230, § 2, Apr. 13, 1970, 84 Stat. 121.)

Code of Federal Regulations (1977, ed.; vol. 45, parts 1-99; pp. 315-33), Title 45, Subtitle A, Part 80 (§§ 80.1-80.13):

Part 80 — Nondiscrimination under programs receiving federal assistance through The Department of Health, Education, and Welfare effectuation of Title VI of The Civil Rights Act of 1964.

Sec.

80.1 Purpose.

80.2 Application of this regulation.

80.3. Discrimination prohibited.

80.4. Assurances required.

80.5. Illustrative application.

80.6. Compliance information.

80.7. Conduct of investigations.

80.8. Procedure for effecting compliance.

80.9. Hearings.

80.10. Decisions and notices.

80.11. Judicial review.

80.12. Effect on other regulations; forms and instructions.

80.13. Definitions.

APPENDIX A: Federal financial assistance to which these regulations apply.

AUTHORITY: Sec. 602, 78 Stat. 252; 42 U.S.C. 2000d-1, unless otherwise noted.

SOURCE: 29 F.R. 16298, Dec. 4, 1964; 29 F.R. 16988, Dec. 11, 1964; 30 F.R. 35, Jan. 5, 1954, unless otherwise noted.

§ 80.1 Purpose.

The purpose of this part is to effectuate the provisions of title VI of the Civil Rights Act of 1964 (hereafter referred to as the "Act") to the end that no person in the United States shall; on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Health, Education, and Welfare.

(Sec. 601, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d)

[29 FR 16298, Dec. 4, 1964, as amended at 38 FR 17982, July 5, 1973]

§ Application of this regulation.

This regulation applies to any program for which Federal financial assistance is authorized to be extended to a recipient under a law administered by the Department, including the Federal assisted programs and activities listed in Appendix A of this regulation. It applies to money paid, property transferred, extended after the effective date of the regulation pursuant to an application approved prior to such effective date. This regulation does not apply to (a) any Federal financial assistance by way of insurance or guaranty contracts, (b) money paid, property transferred, or other assistance extended before the effective date of this regulation, (c) the use of any assistance by any individual who is the ultimate beneficiary under any such program, or (d) any employment practice, under any such program, or any employer, employment agency, or labor organization, except to the extent described in § 80.3. The fact that a type of Federal assistance is not listed in Appendix A shall not mean, if Title VI of the Act is otherwise applicable, that a program is not covered. Federal financial assistance under statutes now in force or hereinafter enacted may be added to this list by notice published in the FEDERAL REGISTER.

(Secs. 602, 604, Civil Rights Act of 1964; 78 Stat. 252, 253; 42 U.S.C. 2000d-1, 2000d-3)

[38 FR 17979, July 5, 1973]

§ 80.3 Discrimination prohibited.

(a) *General.* No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies.

(b) *Specific discriminatory actions prohibited.* (1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin:

(i) Deny an individual any service, financial aid, or other benefit provided under the program;

(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;

(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;

(v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program;

(vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which

is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in paragraph (c) of this section).

(vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

(3) In determining the site or location of a facilities, an applicant or recipient may not make selections with the effect of excluding individuals from, denying them the benefits of or subjecting them to discrimination under any programs to which this regulation applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this regulation.

(4) As used in this section, the services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any service, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance.

(5) The enumeration of specific forms of prohibited discrimination in this paragraph and paragraph (c) of

this section does not limit the generality of the prohibition in paragraph (a) of this section.

(6)(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

(c) *Employment practices.* (1) Where a primary objective of the Federal financial assistance to a program to which this regulation applies is to provide employment, a recipient may not (directly or through contractual or other arrangements) subject an individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment, layoff or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities), including programs where a primary objective of the Federal financial assistance is (i) to reduce the employment of such individuals or to help them through employment to meet subsistence needs, (ii) to assist such individuals through employment to meet expenses incident to the commencement or continuation of their education or training, (iii) to provide work experience which contributes to the education or training of such individuals, or (iv) to provide remunerative activity to such individuals who because of handicaps cannot be readily absorbed in the competitive labor market. The following, under existing laws, have one of the above objectives as a primary objective:

(a) Projects under the Public Works Acceleration Act, Public Law 87-658, 42 U.S.C. 2641-2643.

(b) Work-study under the Vocational Education Act of 1963, as amended, 20 U.S.C. 1371-1374.

(c) Programs assisted under laws listed in Appendix A as respects employment opportunities provided thereunder, or in facilities provided thereunder, which are limited, or for which preference is given, to students, fellows, or other persons in training for the same or related employments.

(d) Assistance to rehabilitation facilities under the Vocational Rehabilitation Act, 29 U.S.C. 32-34, 41a and 41b.

(2) The requirements applicable to construction employment under any such program shall be those specified in or pursuant to Part III of Executive Order 11246 or any Executive order which supersedes it.

(3) Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the foregoing provisions of this paragraph (c) shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.

(d) *Indian Health and Cuban Refugee Services.* An individual shall not be deemed subjected to discrimination by reason of his exclusion from the benefits of a program limited by Federal law to individuals of a particular race, color, or national origin different from his.

(e) *Medical emergencies.* Notwithstanding the foregoing provisions of this section, a recipient of Federal financial assistance shall not be deemed to have failed to comply with paragraph (a) of this section if

immediate provision of a service or other benefit to an individual is necessary to prevent his death or serious impairment of his health, and such service or other benefit cannot be provided except by or through a medical institution which refuses or fails to comply with paragraph (a) of this section.

(Sec. 601, 602, 604, Civil Rights Act of 1964; 78 Stat. 252, 253, 42 U.S.C. 2000d, 2000d-1, 2000d-3)

[29 FR 16298, Dec. 4, 1964, as amended at 38 FR 17979, 17982, July 5, 1973]

§ 80.4 Assurances required.

(a) *General.* (1) Every application for Federal financial assistance to carry out a program to which this part applies, except a program to which paragraph (b) of this section applies, and every application for Federal financial assistance to provide a facility shall, as a condition to its approval and the extension of any Federal financial assistance pursuant to the application, contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part. In the case of an application for Federal financial assistance to provide real property or structures thereon, the assurance shall obligate the recipient, or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. In the case of personal property the assurance shall obligate the recipient for the period during which he retains ownership or possession of the property. In all other cases the assurance shall obligate the recipient for the period during which Federal financial assistance is extended pursuant to the application. The responsible Department official shall specify the form of the foregoing assurances for each program, and the extent to which like assurances will be required of subgrantees, contractors and subcontractors, transfe-

rees, successors in interest, and other participants in the program. Any such assurance shall include provisions which give the United States a right to seek its judicial enforcement.

(2) Where Federal financial assistance is provided in the form of a transfer of real property or interest therein from the Federal Government the instrument effecting or recording the transfer shall contain a covenant running with the land to assure non-discrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. Where no transfer of property is involved but property is improved with Federal financial assistance, the recipient shall agree to include such a covenant to any subsequent transfer of the property. Where the property is obtained from the Federal Government, such covenant may also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant where, in the discretion of the responsible Department official, such a condition and right of reverter is appropriate to the statute under which the real property is obtained and to the nature of the grant and the grantee. In the event a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on such property for the purposes for which the property was transferred, the responsible Department official may agree, upon request of the transferee and if necessary to accomplish such financing, and upon such conditions as he deems appropriate, to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

(b) *Continuing State programs.* Every application by a State or a State agency to carry out a program involving continuing Federal financial assistance to which this regulation applies (including the Federal

financial assistance listed in Part 2 of Appendix A) shall as a condition to its approval and the extension of any Federal financial assistance pursuant to the application (1) contain or be accompanied by a statement that the program is (or, in the case of a new program, will be) conducted in compliance with all requirements imposed by or pursuant to this regulation, and (2) provide or be accompanied by provision for such methods of administration for the program as are found by the responsible Department official to give reasonable assurance that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this regulation.

(c) *Elementary and secondary schools.* The requirements of paragraph (a) or (b) of this section with respect to any elementary or secondary school or school system shall be deemed to be satisfied if such school or school system (1) is subject to a final order of a court of the United States for the desegregation of such school or school system, and provides an assurance that it will comply with such order, including any future modification of such order, or (2) submits a plan for the desegregation of such school or school system which the responsible Department official determines is adequate to accomplish the purposes of the Act and this part, at the earliest practicable time, and provides reasonable assurance that it will carry out such plan; in any case of continuing Federal financial assistance the responsible Department official may reserve the right to redetermine, after such period as may be specified by him, the adequacy of the plan to accomplish the purposes of the Act and the regulations in this part. In any case in which a final order of a court of the United States for the desegregation of such school or school system is entered after submission of such a plan, such plan shall be revised to conform to such final order, including any future modification of such order.

(d) *Assurance from institutions.* (1) In the case of any application for Federal financial assistance to an

institution of higher education (including assistance for construction, for research, for special training project, for student loans or for any other purpose), the assurance required by this section shall extend to admission practices and to all other practices relating to the treatment of students.

(2) The assurance required with respect to an institution of higher education, hospital, or any other institution, insofar as the assurance relates to the institution's practices with respect to admission or other treatment of individuals as students, patients, or clients of the institution or to the opportunity to participate in the provision of services or other benefits to such individuals, shall be applicable to the entire institution unless the applicant establishes, to the satisfaction of the responsible Department official, that the institution's practices in designated parts or programs of the institution will in no way affect its practices in the program of the institution for which Federal financial assistance is sought, or the beneficiaries of or participants in such program. If in any such case the assistance sought is for the construction of a facility or part of a facility, the assurance shall in any event extend to the entire facility and to facilities operated in connection therewith.

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1. Sec. 182; 80 Stat. 1209; 42 U.S.C. 2000d-5)

[29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17980, 17982, July 5, 1973]

§ 80.5 Illustrative application.

The following examples will illustrate the programs aided by Federal financial assistance of the Department. (In all cases the discrimination prohibited is discrimination on the ground of race, color, or national origin prohibited by Title VI of the Act and this regulation, as a condition of the receipt of Federal financial assistance).

(a) In Federally assisted programs for the provision of health or welfare services, discrimination in the selection or eligibility of individuals to receive the services, and segregation or other discriminatory practices in the manner of providing them, are prohibited. This prohibition extends to all facilities and services provided by the grantee under the program or, if the grantee is a State, by a political subdivision of the State. It extends also to services purchased or otherwise obtained by the grantee (or political subdivision) from hospitals, nursing homes, schools, and similar institutions for beneficiaries of the program, and to the facilities in which such services are provided, subject, however, to the provisions of § 80.3(e).

(b) In federally-affected area assistance (P.L. 815 and P.L. 874) for construction aid and for general support of the operation of elementary or secondary schools, or in more limited support to such schools such as for the acquisition of equipment, the provision of vocational education, or the provision of guidance and counseling services, discrimination by the recipient school district in any of its elementary or secondary schools in the admission of students, or in the treatment of its students in any aspect of the educational process, is prohibited. In this and the following illustrations the prohibition of discrimination in the treatment of students or other trainees includes the prohibition of discrimination among the students or trainees in the availability or use of any academic, dormitory, eating, recreational, or other facilities of the grantee or other recipient.

(c) In a research, training, demonstration, or other grant to a university for activities to be conducted in a graduate school, discrimination in the admission and treatment of students in the graduate school is prohibited, and the prohibition extends to the entire university unless it satisfies the responsible Department official that practices with respect to other parts or programs of the university will not interfere, directly

or indirectly, with fulfilment of the assurance required with respect to the graduate school.

(d) In a training grant to a hospital or other nonacademic institution, discrimination is prohibited in the selection of individuals to be trained and in their treatment by the grantee during their training. In a research or demonstration grant to such an institution discrimination is prohibited with respect to any educational activity and any provision of medical or other services and any financial aid to individuals incident to the program.

(e) In grants to assist in the construction of facilities for the provision of health, educational or welfare services, assurances will be required that services will be provided without discrimination, to the same extent that discrimination would be prohibited as a condition of Federal operating grants for the support of such services. Thus, as a condition of grants for the construction of academic, research, or other facilities at institutions of higher education, assurances will be required that there will be no discrimination in the admission or treatment of students. In case of hospital construction grants the assurance will apply to patients, to interns, residents, student nurses, and other trainees, and to the privilege of physicians, dentists, and other professionally qualified persons to practice in the hospital, and will apply to the entire facility for which, or for a part of which, the grant is made, and to facilities operated in connection therewith. In other construction grants the assurances required will similarly be adapted to the nature of the activities to be conducted in the facilities for construction of which the grant have been authorized by Congress.

(f) Upon transfers of real or personal surplus property for health or educational uses, discrimination is prohibited to the same extent as in the case of grants for the construction of facilities or the provision of equipment for like purposes.

(g) Each applicant for a grant for the construction of educational television facilities is required to provide an assurance that it will, in its broadcast services, give due consideration to the interests of all significant racial or ethnic groups within the population to be served by the applicant.

(h) A recipient may not take action that is calculated to bring about indirectly what this regulation forbids it accomplish directly. Thus, a State in selecting or approving projects or sites for the construction of public libraries which will receive Federal financial assistance, may not base its selections or approvals on criteria which have the effect of defeating or of substantially impairing accomplishments of the objectives of the Federal assistance as respects individuals of a particular race, color or national origin.

(i) In some situations, even though past discriminatory practices attributable to a recipient or applicant have been abandoned, the consequences of such practices continue to impede the full availability of a benefit. If the efforts required of the applicant or recipient under § 80.6(d), to provide information as to the availability of the program or activity and the rights of beneficiaries under this regulation have failed to overcome these consequences, it will become necessary under the requirement stated in (i) of § 80.3(b) (6) for such applicant or recipient to take additional steps to make the benefits fully available to racial and nationality groups previously subject to discrimination. This action might take the form, for example, of special arrangements for obtaining referrals or making selections which will insure that groups previously subjected to discrimination are adequately served.

(j) Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color,

or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service.

(Sec. 601, 602. Civil Rights Act of 1964; 78 Stat. 252: 42 U.S.C. 2000d, 2000d-1)

[29 FR 16298. Dec. 4, 1964, as amended at 38 FR 17980, 17982, July 5, 1973]

§ 80.6 Compliance information.

(a) *Cooperation and assistance.* The responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part.

(c) *Access to sources of information.* Each recipient shall permit access by the responsible Department

official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information. Asserted considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance with this Part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement shall not be disclosed except where necessary informal enforcement proceedings or where otherwise required by law.

(d) *Information to beneficiaries and participants.* Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the program for which the recipient receives Federal financial assistance, and made such information available to them in such manner, as the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this regulation.

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1)

[29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17981, 17982, July 5, 1973]

§ 80.7 Conduct of investigations.

(a) *Periodic compliance reviews.* The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this part.

(b) *Complaints.* Any person who believes himself or any specific class of individuals to be subjected to

discrimination prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee.

(c) *Investigations.* The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 80.8.

(2) If an investigation does not warrant action pursuant to subparagraph (1) of this paragraph the responsible Department official or his designee will so inform the recipient and the complainant, if any, in writing.

(e) *Intimidatory or retaliatory acts prohibited.* No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part. The identity of

complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1)

[29 FR 16298, Dec. 4, 1964, as amended at 38 FR 17981, 17982, July 5, 1973]

§ 80.8 Procedure for effecting compliance.

(a) *General.* If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

(b) *Noncompliance with § 80.4.* If an applicant fails or refuses to furnish an assurance required under § 80.4 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. The Department shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph except that the Department shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application therefor approved prior to the effective date of this part.

(c) *Termination of or refusal to grant or to continue Federal financial assistance.* No order suspending, terminating or refusing to grant or continue Federal financial assistance shall become effective until (1) the responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, (3) the expiration of 30 days after the Secretary has filed with the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof in which such noncompliance has been so found.

(d) *Other means authorized by law.* No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take such corrective action as may be appropriate.

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1. Sec. 182, 80 Stat. 1209; 42 U.S.C. 2000d-5)

[29 FR 16298. Dec. 4, 1964, as amended at 32 FR 14556. Oct. 19, 1967; 38 FR 17982, July 5, 1973]

§ 80.9 Hearings.

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by § 80.8(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request of the responsible Department official that the matter be scheduled for hearing or (2) advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 602 of the Act and § 80.8(c) of this regulation and consent to the making of a decision on the basis of such information as may be filed as the record.

(b) *Time and place of hearing.* Hearings shall be held at the offices of the Department in Washington, D.C., at a time fixed by the responsible Department official unless he determines that the convenience of the applicant or recipient or of the Department requires that another place be selected. Hearings shall be held before a hearing examiner designated in accordance with 5 U.S.C. 3105 and 3344 (section 11 of the Administrative Procedure Act).

(c) *Right to counsel.* In all proceedings under this section, the applicant or recipient and the Department shall have the right to be represented by counsel.

(d) *Procedures, evidence, and record.* (1) The hearing, decision, and any administrative review thereof shall be conducted in conformity with sections 5-8 of the Administrative Procedure Act, and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Department and the applicant or recipient shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the officer conducting the hearing at the outset of or during the hearing. Any person (other than a Government employee considered to be on official business) who, having been invited or requested to appear and testify as a witness on the Government's behalf, attends at a time and place scheduled for a hearing provided for by this part, may be reimbursed for his travel and actual expenses of attendance in an amount not to exceed the amount payable under the standardized travel regulations to a Government employee traveling on official business.

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken fro the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments and other evidence offered or taken for the record transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(e) *Consolidated or Joint Hearings.* In cases in which the same or related facts are asserted to constitute noncompliance with this regulation with respect to two or more programs to which this part applies, or noncompliance with this part and the regulations of one or more other Federal departments or agencies issued under Title VI of the Act, the responsible Department official may, by agreement with such other departments or agencies where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules of procedures not inconsistent with this part. Final decisions in such cases, insofar as this regulation is concerned, shall be made in accordance with § 80.10.

(Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1)

[29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17961, 17982, July 5, 1973]

§ 80.10. Decisions and notices.

(a) *Decisions by hearing examiners.* After a hearing is held by a hearing examiner such hearing examiner shall either make an initial decision, if so authorized, or certify the entire record including his recommended findings and proposed decision to the reviewing authority for a final decision, and a copy of such initial decision or certification shall be mailed to the applicant or recipient and to the complainant, if any. Where the initial decision referred to in this paragraph or in paragraph (c) of this section is made by the hearing examiner, the applicant or recipient or the counsel for the Department may, within the period provided for in the rules of procedure issued by the responsible Department official, file with the reviewing authority exceptions to the initial decision, with his reasons therefor. Upon the filing of such exceptions the reviewing authority shall review the initial decision and issue its own decision thereof including the reasons therefor. In the absence of exceptions the initial decision shall constitute the final decision, subject to the provisions of paragraph (e) of this section.

(b) *Decisions on record or review by the reviewing authority.* Whenever a record is certified to the reviewing authority for decision or it reviews the decision of a hearing examiner pursuant to paragraph (a) or (c) of this section, the applicant or recipient shall be given reasonable opportunity to file with its briefs or other written statements of its contentions, and a copy of the final decision of the reviewing authority shall be given in writing to the applicant or recipient and to the complainant, if any.

(c) *Decisions on record where a hearing is waived.* Whenever a hearing is waived pursuant to § 80.9(a) the reviewing authority shall make its final decision on the record or refer the matter to a hearing examiner for an initial decision to be made on the record. A copy of such decision shall be given in writing to the applicant or recipient, and to the complainant, if any.

(d) *Rulings required.* Each decision of a hearing examiner or reviewing authority shall set forth a ruling on each finding, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this part with which it is found that the applicant or recipient has failed to comply.

(e) *Review in certain cases by the Secretary.* If the Secretary has not personally made the final decision referred to in paragraphs (a), (b), or (c) of this section, a recipient or applicant or the counsel for the Department may request the Secretary to review a decision of the Reviewing Authority in accordance with rules of procedure issued by the responsible Department official. Such review is not a matter of right and shall be granted only where the Secretary determines there are special and important reasons therefor. The Secretary may grant or deny such request, in whole or in part. He may also review such a decision upon his own motion in accordance with rules of procedure issued by the responsible Department official. In the absence of a review under this paragraph, a final decision referred to in paragraphs (a), (b), (c) of this section shall become

the final decision of the Department when the Secretary transmits it as such to Congressional committees with the report required under section 602 of the Act. Failure of an applicant or recipient to file an exception with the Reviewing Authority or to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

(f) *Content of orders.* The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance in whole or in part, to which this regulation applies, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of the Act and this regulation, including provisions designed to assure that no Federal financial assistance to which this regulation applies will thereafter be extended under such law or laws to the applicant or recipient determined by such decision to be in default in its performance of an assurance given by it pursuant to this regulation, or to have otherwise failed to comply with this regulation unless and until it corrects its noncompliance and satisfies the responsible Department official that it will fully comply with this regulation.

(g) *Post-termination proceedings.* (1) An applicant or recipient adversely affected by an order issued under paragraph (f) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility or if it brings itself into compliance with this part and provides reasonable assurance that it will fully comply with this part. An elementary or secondary school or school system which is unable to file an assurance of compliance with § 80.3 shall be restored to full eligibility to receive Federal financial assistance, if it files a court order or a plan for desegregation which meets the requirements of § 80.4(c), and provides reasonable assurance that it will comply with the court order or plan.

(2) Any applicant or recipient adversely affected by an order entered pursuant to paragraph (f) of this section may at any time request the responsible Department official to restore fully its eligibility to receive Federal financial assistance. Any such request shall be supported by information showing that the applicant or recipient has met the requirements of subparagraph (1) of this paragraph. If the responsible Department official determines that those requirements have been satisfied, he shall restore such eligibility.

(3) If the responsible Department official denies any such request, the applicant or recipient may submit a request for a hearing in writing, specifying why it believes such official to have been in error. It shall thereupon be given an expeditious hearing, with a decision on the record, in accordance with rules and procedure issued by the responsible Department official. The applicant or recipient will be restored to such eligibility if it proves at such hearing that it satisfied the requirements of subparagraph (1) of this paragraph. While proceedings under this paragraph are pending, the sanctions imposed by the order issued under paragraph (f) of this section shall remain in effect.

(Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1)

[29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17981, 17982, July 5, 1973]

§ 80.11 Judicial review.

Action taken pursuant to section 602 of the Act is subject to judicial review as provided in section 603 of the Act.

(Sec. 603, 78 Stat. 253; 42 U.S.C. 2000d-2)

[29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967]

§ 80.12. Effect on other regulations, forms and instructions.

(a) *Effect on other regulations.* All regulations, orders, or like directions heretofore issued by any officer of the Department which impose requirements designed to prohibit any discrimination against individuals on the ground of race, color, or national origin under any program to which this regulation applies, and which authorize the suspension or termination of or refusal to grant or to continue Federal financial assistance to any applicant for or recipient of assistance for failure to comply with such requirements, are hereby superseded to the extent that such discrimination is prohibited by this regulation, except that nothing in this regulation shall be deemed to relieve any person of any obligation assumed or imposed under any such superseded regulation, order, instruction, or like direction prior to the effective date of this regulation. Nothing in this regulation, however, shall be deemed to supersede any of the following (including future amendments thereof): (1) The "Standards for a Merit System of Personnel Administration," issued jointly by the Secretaries of Defense, of Health, Education, and Welfare, and of Labor. 45 CFR Part 70; (2) Executive Order 11063 and regulations issued thereunder, or any other regulations or instructions, insofar as such Order, regulations, or instructions prohibit discrimination on the ground of race, color, or national origin in any program or situation to which this regulation is inapplicable, or prohibit discrimination on any other ground; or (3) requirements for Emergency School Assistance as published in 35 FR 13442 and codified as 45 CFR Part 181.

(b) *Forms and instructions.* The responsible Department official shall issue and promptly make available to interested persons forms and detailed instructions and procedures for effectuating this part.

(c) *Supervision and coordination.* The responsible Department official may from time to time assign to officials of the Department, or to officials of other departments or agencies of the Government with the consent of such departments or agencies, responsibilities in connection with the effectuation of the purposes of Title VI of the Act and this regulation (other than responsibility for review as provided in § 80.10(e)), including the achievements of effective coordination and maximum uniformity within the Department and within the Executive Branch of the Government in the application of Title VI and this regulation to similar programs and in similar situations. Any action taken, determination made, or requirement imposed by an official of another Department or Agency acting pursuant to an assignment of responsibility under this subsection shall have the same effect as though such action had been taken by the responsible official of this Department.

(Sec. 602, Civil Rights Act of 1964; 78 Stat. 252, 42 U.S.C. 2000d-1)

[29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17981, 17982, July 5, 1973]

§ 80.13. Definitions.

As used in this part—

(a) The term "Department" means the Department of Health, Education, and Welfare, and includes each of its operating agencies and other organizational units.

(b) The term "Secretary" means the Secretary of Health, Education, and Welfare.

(c) The term "responsible Department official" means the Secretary or, to the extent of any delegation by the Secretary of authority to act in his stead under any one or more provisions of this part, any person or persons to whom the Secretary has heretofore delegated, or to whom the Secretary may hereafter delegate such authority.

(d) The term "reviewing authority" means the Secretary, or any person or persons (including a board or other body specially created for that purpose and also including the responsible Department official) acting pursuant to authority delegated by the Secretary to carry out responsibilities under § 80.10(a)-(d).

(e) The term "United States" means the States of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and the territories and possessions of the United States, and the term "State" means any one of the foregoing.

(f) The term "Federal financial assistance" includes (1) grants and loans of Federal funds, (2) the grant or donation of Federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

(g) The term "program" includes any program, project, or activity for the provision of services, financial aid, or other benefits to individuals (including education or training, health, welfare, rehabilitation, housing, or other services, whether provided through employees of the recipient of Federal financial assistance or provided by others through contracts or other arrangements with the recipient, and including work opportunities and cash or loan or other assistance to individuals), or for the provision of facilities for furnishing services, financial aid or other benefits to individuals. The services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any

services, financial aid, or other benefits provided with the aid of Federal financial assistance or with the aid of any non-Federal funds, property, or other resources required to be expended or made available for the program to meet matching requirements or other conditions which must be met in order to receive the Federal financial assistance, and to include any services, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance or such non-Federal resources.

(h) The term "facility" includes all or any portion of structures, equipment, or other real or personal property or interests therein, and the provision of facilities includes the construction, expansion, renovation, remodeling, alteration or acquisition of facilities.

(i) The term "recipient" means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under any such program.

(j) The term "primary recipient" means any recipient which is authorized or required to extend Federal financial assistance to another recipient for the purpose of carrying out a program.

(k) The term "applicant" means one who submits an application, request, or plan required to be approved by a Department official, or by a primary recipient, as a condition to eligibility for Federal financial assistance, and the term "application" means such an application, request, or plan.

(Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1)

[29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17982, July 5, 1973]

APPENDIX A

FEDERAL FINANCIAL ASSISTANCE TO WHICH THESE REGULATIONS APPLY

Part 1. Assistance other than for State-Administered Continuing Programs

1. Loans for acquisition or equipment for academic subjects, and for minor remodeling (20 U.S.C. 445).

2. Construction of facilities for institutions of higher education (20 U.S.C. 701-758).

3. School Construction in federally-affected and in major disaster areas (20 U.S.C. 631-647).

4. Construction of educational broadcast facilities (47 U.S.C. 390-399).

5. Loan service of captioned films and educational media; research on, and production and distribution of, educational media for the handicapped, and training of persons in the use of such media for the handicapped (20 U.S.C. 1452).

6. Demonstration residential vocational education schools (20 U.S.C. 1321).

7. Research and related activities in education of handicapped children (20 U.S.C. 1441).

8. Educational research, dissemination and demonstration projects; research training; and construction under the Cooperation Research Act (20 U.S.C. 331-332(b)).

9. Research in teaching modern foreign languages (20 U.S.C. 512).

10. Training projects for manpower development and training (42 U.S.C. 2601, 2602, 2610a-2610c).

11. Research and training projects in Vocational Education (20 U.S.C. 1281(a), 1282-1284).

12. Allowances to institutions training NDEA graduate fellows (20 U.S.C. 461-465).

13. Grants for training in librarianship (20 U.S.C. 1031-1033).

14. Grants for training personnel for the education of handicapped children (20 U.S.C. 1431).

15. Allowances for institutions training teachers and related educational personnel in elementary and secondary education, or post-secondary vocational education (20 U.S.C. 1111-1118).

16. Recruitment, enrollment, training and assignment of Teacher Corps personnel (20 U.S.C. 1101-1107a).

17. Operation and maintenance of schools in Federally-affected and in major disaster areas (20 U.S.C. 236-241; 241-1; 242-244).

18. Grants or contracts for the operation of training institutes for elementary or secondary school personnel to deal with special educational problems occasioned by desegregation (42 U.S.C. 2000c-3).

19. Grants for in-service training of teachers and other schools personnel and employment of specialists in desegregation problems (42 U.S.C. 2000c-4).

20. Higher education students loan program (Title II, National Defense Education Act, 20 U.S.C. 421-429).

21. Educational Opportunity grants and assistance for State and private programs of low-interest insured loans and State loans to students in institutions of higher education (Title IV, Higher Education Act of 1965, 20 U.S.C. 1061-1087).

22. Grants and contracts for the conduct of Talent Search, Upward Bound, and Special Services Programs (20 U.S.C. 1068).

23. Land-grant college aid (7 U.S.C. 301-308; 321-326-328-331).

24. Language and area centers (Title VI National Defense Education Act, 20 U.S.C. 511).

25. American Printing House for the Blind (20 U.S.C. 101-105).

26. Future Farmers of America (36 U.S.C. 271-391) and similar programs.

27. Science clubs (P.L. 85-875, 20 U.S.C. 2, note).

28. Howard University (20 U.S.C. 121-129).

29. Gallaudet College (31 D.C. Code, Ch. 10).

30. Establishment and operation of a model secondary school for the deaf by Gallaudet College (31 D.C. Code 1051-1053; 80 Stat. 1027-1028).

31. Faculty development programs, workshops and institutes (20 U.S.C. 1131-1132).

32. National Technical Institute for the Deaf (20 U.S.C. 681-685).

33. Institutes and other programs for training educational personnel (Parts D, E & F, Title V, Higher Education Act of 1965) (20 U.S.C. 1119-1119c-4).

34. Grants and contracts for research and demonstration projects in librarianship (20 U.S.C. 1034).

35. Acquisition of college library resources (20 U.S.C. 1021-1028).

36. Grants for strengthening developing institutions of higher education (20 U.S.C. 1051-1054); National Fellowships for teaching at developing institutions (20 U.S.C. 1055), and grants to retired professors to teach at developing institutions (20 U.S.C. 1056).

37. College Work-Study Program (42 U.S.C. 2751-2757).

38. Financial assistance for acquisition of higher education equipment, and minor remodeling (20 U.S.C. 1121-1129).

39. Grants for special experimental demonstration projects and teacher training in adult education (20 U.S.C. 1208).

40. Grant programs for advanced and undergraduate international studies (20 U.S.C. 1171-1176; 22 U.S.C. 2452(b)).

41. Experimental projects for developing State leadership or establishment of special services (20 U.S.C. 865).

42. Grants to and arrangements with State educational and other agencies to meet special educational

needs of migratory children of migratory agricultural workers (20 U.S.C. 241e(c)).

43. Grants by the Commissioner of Education to local educational agencies for supplementary educational centers and services; guidance, counseling, and testing (20 U.S.C. 841-844; 844b).

44. Resource centers for improvement of education of handicapped children (20 U.S.C. 1421) and centers and services for deaf-blind children (20 U.S.C. 1422).

45. Recruitment of personnel and dissemination of information on education of handicapped (20 U.S.C. 1433).

46. Grants for research and demonstrations relating to physical education or recreation for handicapped children (20 U.S.C. 1442) and training of physical educators and recreation personnel (20 U.S.C. 1434).

47. Dropout prevention projects (20 U.S.C. 887).

48. Bilingual education programs (20 U.S.C. 880b-880b-6).

49. Grants to agencies and organizations for Cuban refugees (22) U.S.C. 2601(b)(4).

50. Grants and contracts for special programs for children with specific learning disabilities including research and related activities, training and operating model centers (20 U.S.C. 1461).

51. Curriculum development in vocational and technical education (20 U.S.C. 1391).

52. Establishment, including construction, and operation of a National Center on Educational Media and Materials for the Handicapped (20 U.S.C. 1453).

53. Grants and contracts for the development and operation of experimental pre-school and early education programs for handicapped (20 U.S.C. 1423).

54. Grants to public or private non-profit agencies to carry on the Follow Through Program in kindergarten and elementary schools (42 U.S.C. 2809(a)(2)).

55. Grants for programs of cooperative education and grants and contracts for training and research in cooperative education (20 U.S.C. 1087a-1087c).

56. Grants and contracts to encourage the sharing of college facilities and resources (network for knowledge) (20 U.S.C. 1133-1133b).

57. Grants, contracts, and fellowships to improve programs preparing persons for public service and to attract students to public service (20 U.S.C. 1134-1134b).

58. Grants for the improvement of graduate programs (20 U.S.C. 1135-1135c).

59. Contracts for expanding and improving law school clinical experience programs (20 U.S.C. 1136-1136b).

60. Exemplary programs and projects in vocational education (20 U.S.C. 1301-1305).

61. Grants to reduce borrowing cost for construction of residential schools and dormitories (20 U.S.C. 1323).

62. Project grants and contracts for research and demonstration relating to new or improved health facilities and services (sec. 304, PHS Act, 42 U.S.C. 242b).

63. Grants for construction or modernization of emergency rooms of general hospitals (Title VI, Part C, PHS Act, 42 U.S.C. 291j).

64. Institutional and special projects grants to schools of nursing (sections 805-808, PHS Act, 42 U.S.C. 296d-296g).

65. Grants for construction and initial staffing of facilities for prevention and treatment of alcoholism (sec. 241-2, Community Mental Health Centers Act (42 U.S.C. 2688 f and g).

66. Grants for construction and initial staffing of specialized facilities for the treatment of alcoholics requiring care in such facilities (sec. 243, Community Mental Health Centers Act, 42 U.S.C. 2688h).

67. Special project grants for training programs, evaluation of existing treatment programs, and conduct of significant programs relating to treatment of alcoholics (sec. 246, Community Mental Health Centers Act, 42 U.S.C. 2688j-1).

68. Grants for construction and initial staff of treatment facilities for narcotic addicts (sec. 251, Community Mental Health Centers Act, 42 U.S.C. 2688m).

69. Special project grants for training programs, evaluation of existing treatment programs, and conduct of significant programs relating to treatment of narcotics addicts (sec. 252, Community Mental Health Centers Act, 42 U.S.C. 2688n-1).

70. Grants for consultation services for Community Mental Health Centers, alcoholism prevention and treatment facilities for narcotic addicts, and facilities for mental health of children (sec. 264, Community Mental Health Centers Act, 42 U.S.C. 2688r).

71. Grants for construction and initial staff of facilities for mental health of children (sec. 271, Community Mental Health Centers Act, 42 U.S.C. 2688u).

72. Special project grants for training programs and evaluation of existing treatment program relating to mental health of children (sec. 272, Community Mental Health Centers Act, 42 U.S.C. 2688x).

73. Grants and loans for construction and modernization of medical facilities in the District of Columbia (P.L. 90-457; 82 Stat. 631-3).

74. Teaching facilities for nurse training (secs. 801-804, Public Health Service Act, 42 U.S.C. 296-296c).

75. Teaching facilities for allied health professions personnel (sec. 791, Public Health Service Act, 42 U.S.C. 295h).

76. Mental retardation research facilities (Title VI, Part D, Public Health Service Act, 42 U.S.C. 295-395e).

77. George Washington University Hospital construction (76 Stat. 83, P.L. 87-460, May 31, 1962).

78. Research projects, including conferences, communication activities and primate or other center grants (secs, 301, 303, 304, and 308, Public Health Service Act, 42 U.S.C. 241, 242a, 242b, and 242f).

79. General research support (sec. 301(d), Public Health Service Act, 42 U.S.C. 241).

80. Mental Health demonstrations and administrative studies (sec. 303(a)(2), Public Health Service Act, 42 U.S.C. 242a).

81. Migratory workers health services (sec. 310, Public Health Service Act, 42 U.S.C. 242h).

82. Immunization programs (sec. 317, Public Health Service Act, 42 U.S.C. 247b).

83. Health research training projects and fellowship grants (secs. 301, 433, Public Health Service Act, 42 U.S.C. 242, 289c).

84. Categorical (heart, cancer, etc.) grants for training, traineeships or fellowships (secs. 303, 433, etc., Public Health Service Act, 42 U.S.C. 242a, 289c, etc.).

85. Advanced professional nurse traineeships (sec. 821, Public Health Service Act, 42 U.S.C. 297).

86. Department projects under Appalachian Regional Development Act (40 U.S.C. App. A).

87. Grants to institutions for traineeships for professional public health personnel (sec. 306, Public Health Service Act, 42 U.S.C. 242d).

88. Grants for graduate or specialized training in public health (sec. 309, Public Health Service Act, 42 U.S.C. 242g).

89. Health professions school student loan program (Title VII, Part C, Public Health Service Act, 42 U.S.C. 294-294(k)).

90. Grants for provision in schools of public health of training, consultation and technical assistance in the field of public health and in the administration of state

or local public health programs (sec. 349(c)), Public Health Service Act, 42 U.S.C. 242(g)(c)).

91. Project grants for training, studies, or demonstrations looking metropolitan area, or other local area plans for health services (sec. 314(c), Public Health Service Act, 42 U.S.C. 246(c)).

92. Project grants for training, studies, or demonstrations looking toward the development of improved comprehensive health planning (sec. 314(c), Public Health Service Act, 42 U.S.C. 246(c)).

93. Project grants for health services development (sec. 314(e), Public Health Service Act, 42 U.S.C. 246(e)).

94. Institutional and special grants to health professions schools (Title VII, Part E, Public Health Service Act, 42 U.S.C. 295f-295f-4).

95. Improvement grants to centers for allied health professions (sec. 792, Public Health Service Act, 42 U.S.C. 295h-1).

96. Scholarship grants to health professions schools (Title VII, Part F, Public Health Service Act, 42 U.S.C. 295h-1).

97. Scholarship grants to schools of nursing (Title VIII, Part D, Public Health Service Act, 42 U.S.C. 198c-298c-5).

98. Traineeships for advanced training of allied health professions personnel (sec. 793, Public Health Service Act, 42 U.S.C. 295h-2).

99. Contracts to encourage full utilization of nursing educational talent (sec. 868, Public Health Service Act, 42 U.S.C. 298c-7).

100. Grants to community mental health centers for the compensation of professional and technical personnel for the initial operation of new centers or of new services in centers (Community Mental Health Centers Act, Part B, 42 U.S.C. 2688-2688d).

101. Grants for the planning, construction, equipment and operation of multi-county demonstration

health projects in the Appalachian region (sec. 202 of Appalachian Regional Development Act. P.L. 89-4, as amended, P.L. 90-103, 40 U.S.C. App. 202).

102. Education, research, training, and demonstrations in the fields of heart disease, cancer, stroke and related diseases (secs. 900-110, Public Health Service Act, 42 U.S.C. 299a-j).

103. Assistance to medical libraries (secs. 390-399, Public Health Service Act. 42 U.S.C. 280b-280b-9).

104. Nursing student loans (secs. 822-828, Public Health Service Act, 42 U.S.C. 297a-g).

105. Hawaii leprosy payments (sec. 331, Public Health Service Act, 42 U.S.C. 255).

106. Heart disease laboratories and related facilities for patient care (sec. 412(d), Public Health Service Act, 42 U.S.C. 287a(d)).

107. Grants for construction of hospitals serving Indians (P.L. 85-151, 42 U.S.C. 2005).

108. Indian Sanitation Facilities (P.L. 86-121, 42 U.S.C. 2004a).

109. Research projects relating to maternal and child health services and crippled children's services (42 U.S.C. 712).

110. Maternal and child health special project grants to State agencies and institutions of higher learning (42 U.S.C. 703(s)).

111. Maternity and infant care and family planning services; special project grants to local health agencies and other organizations (42 U.S.C. 708).

112. Special project grants to State agencies and institutions of higher learning for crippled children's services (42 U.S.C. 704(2)).

113. Special project grants for health of school and preschool children (42 U.S.C. 709) and for dental health of children (42 U.S.C. 710).

114. Grants to institutions of higher learning for training personnel for health care and related services for mothers and children (42 U.S.C. 711).

115. Grants and contracts for the conduct of research, experiments, or demonstrations relating to the developments, utilization, quality, organization, and financing of services, facilities, and resources of hospitals, long-term care facilities, for other medical facilities (sec. 304, Public Health Service Act, as amended by P.L. 90-174, 42 U.S.C. 242b).

116. Health research facilities (Title VII Part A, Public Health Service Act, 42 U.S.C. 292-292j).

117. Teaching facilities for health professions personnel (Title VII, Part B, Public Health Service Act, 42 U.S.C. 293-293h).

118. Project grants and contracts for research, development, training, and studies in the field of electronic product radiation (Sec. 356, Public Health Service Act, 42 U.S.C. 263d).

119. Project grants and contracts for research, studies, demonstrations, training, and education relating to coal mine health (sec. 501, Federal Coal Mine Health and Safety Act of 1969, Public Law 91-173).

120. Surplus real and related personal property disposal (40 U.S.C. 484(k)).

121. Supplementary medical insurance benefits for the aged (Title XVIII, Part A, Social Security Act, 42 U.S.C. 1395c-1395i-2).

122. Issuance of rent-free permits for vending stands, credit unions, employee associations, etc. (20 U.S.C. 107-107f; 45 C.F.R. Part 20; sec. 25, 12 U.S.C. 1170).

123. Grants for special vocational rehabilitation projects (29 U.S.C. 34(a)(1)).

124. Experimental, pilot or demonstration projects to promote the objectives of Title I, X, XIV, XVI, or XIX or Part A of Title IV of the Social Security Act (42 U.S.C. 1315).

125. Social Security and welfare cooperative research or demonstration projects (42 U.S.C. 1310).

126. Child welfare research, training, or demonstration projects (42 U.S.C. 626).

127. Training projects (Title VI, Older Americans Act, 42 U.S.C. 3041-3042).

128. Grants for expansion of vocational rehabilitation services (29 U.S.C. 34(a)(2) (A)).

129. Grants for construction of rehabilitation facilities (29 U.S.C. 41a(a)-(e)) and for initial staffing of rehabilitation facilities (29 U.S.C. 41a(f)).

130. Project development grants for rehabilitation facilities (29 U.S.C. 41a(g)(2)).

131. Rehabilitation Facility improvement grants (29 U.S.C. 41b(b)).

132. Agreement for the establishment and operation of a national center for deaf-blind youths and adults (29 U.S.C. 42a).

133. Project grants for services for migratory agricultural workers (29 U.S.C. 42b).

134. Grants for initial staffing of community mental retardation facilities (42 U.S.C. 2678-2678d).

135. Grants for training welfare personnel and for expansion and development of undergraduate and graduate social work programs (42 U.S.C. 906, 908).

136. Research and development projects concerning older Americans (42 U.S.C. 3031-3032).

137. Grants to States for training of nursing home administrators (42 U.S.C. 1396g (e)).

138. Contracts or jointly financed cooperative arrangements with industry (29 U.S.C. 34(a)(2)(B)).

139. Project grants for new careers in rehabilitation (29 U.S.C. 34(a)(2)(C)).

140. Children of low-income families (20 U.S.C. 241a-241m).

141. Grants for training (29 U.S.C. 37(a)(2)).

142. Grants for projects for training services (29 U.S.C. 41b(a)).

143. Grants for comprehensive juvenile delinquency planning (42 U.S.C. 3811).

144. Grants for project planning in juvenile delinquency (42 U.S.C. 3812).

145. Grants for juvenile delinquency rehabilitative services projects (42 U.S.C. 3822, 3842).

146. Grants for juvenile delinquency preventive service projects (42 U.S.C. 3861).

147. Grants for training projects in juvenile delinquency fields (42 U.S.C. 3861).

148. Grants for development of improved techniques and practices in juvenile delinquency services (42 U.S.C. 3871).

149. Grants for technical assistance in juvenile delinquency services (42 U.S.C. 3872).

150. Grants for State technical assistance to local units in juvenile delinquency services (42 U.S.C. 3873).

151. Grants for public service centers projects (42 U.S.C. 2744).

152. Grants to public or private non-profit agencies to carry on the Project Headstart Program (42 U.S.C. 2809(a)(1)).

153. Project grants for new careers for the handicapped (29 U.S.C. 34(a)(2)(D)).

154. Construction, demonstration, and training grants for university-affiliated facilities for persons with developmental disabilities (42 U.S.C. 2661-2666).

Part 2. Continuing Assistance to State Administered Programs.

1. Grants to States for public library services and construction, interlibrary cooperation and specialized

State library services for certain State institutions and the physically handicapped (20 U.S.C. 351-355).

2. Grants to States for strengthening instruction in academic subjects (20 U.S.C. 441-444).

3. Grants to States for vocational education (20 U.S.C. 1241-1264).

4. Arrangements with State education agencies for training under the Manpower Development and Training Act (42 U.S.C. 2601-2602, 2610a).

5. Grants to States to assist in the elementary and secondary education of children of low-income families (20 U.S.C. 241a-241m).

6. Grants to States to provide for school library resources, textbooks and other instructional materials for pupils and teachers in elementary and secondary schools (20 U.S.C. 821-827).

7. Grants to States to strengthen State departments of education (20 U.S.C. 861-870).

8. Grants to States for community service programs (20 U.S.C. 1001-1011).

9. Grants to States for adult basic education and related research, teacher training and special projects (20 U.S.C. 1201-1211).

10. Grants to State educational agencies for supplementary educational centers and services, and guildance, counseling and testing (20 U.S.C. 841-847).

11. Grants to States for research and training in vocational education (20 U.S.C. 1281(b)).

12. Grants to States for exemplary programs and projects in vocational education (20 U.S.C. 1301-1305).

13. Grants to States for residential vocational education schools (20 U.S.C. 1321).

14. Grants to States for consumer and homemaking education (20 U.S.C. 1341).

15. Grants to States for cooperative vocational educational program (20 U.S.C. 1351-1355).

16. Grants to States for vocational work-study programs (20 U.S.C. 1371-1374).

17. Grants to States to attract and qualify teachers to meet critical teaching shortages (20 U.S.C. 1108-1110c).

18. Grants to States for education of handicapped children (20 U.S.C. 1411-1414).

19. Grants for administration of State plans and for comprehensive planning to determine construction needs of institutions of higher education (20 U.S.C. 715(b)).

20. Grants to States for comprehensive health planning (sec. 314(a), Public Health Service Act, 42 U.S.C. 246(a)).

21. Grants to States for establishing and maintaining adequate public health services (sec. 314(d), Public Health Service Act, 42 U.S.C. 246(d)).

22. Grants, loans, and loan guarantees with interest subsidies for hospital and medical facilities (Title VI, Public Health Service Act, 42 U.S.C. 291 et seq.).

23. Grants to States for community mental health centers construction (Community Mental Health Centers Act, Part A, 42 U.S.C. 2681-2687).

24. Cost of rehabilitation services (Title II, Social Security Act sec. 2222(d); 42 U.S.C. 422(d)).

25. Surplus personal property disposal donations for health and educational purposes through State agencies (40 U.S.C. 484(j)).

26. Grants for State and community programs on aging (Title III, Older Americans Act, 42 U.S.C. 3021-3025).

27. Grants to States for planning, provision of services, and construction and operation of facilities for persons with developmental disabilities (42 U.S.C. 2670-2677c).

28. Grants to States for vocational rehabilitation services (29 U.S.C. 32); for innovation of vocational

rehabilitation services)29 U.S.C. 33); and for rehabilitation facilities planning (29 U.S.C. 41a(g)(1)).

29. Designation of State licensing agency for blind operator of vending stands (20 U.S.C. 107-107f).

30. Grants to States for old-age assistance (42 U.S.C. 301 et seq.); aid to families with dependent children (42 U.S.C. 601 et seq.); child-welfare services (42 U.S.C. 620 et seq.); aid to the blind (42 U.S.C. 1201 et seq.); aid to the permanently and totally disabled (42 U.S.C. 1351 et seq.); aid to the aged, blind, or disabled (42 U.S.C. 1381 et seq.); medical assistance (42 U.S.C. 1396 et seq.).

31. Grants to States for maternal and child health and crippled children's services (42 U.S.C. 701-707); for special projects for maternal and infant care (42 U.S.C. 708).

32. Grants to States for juvenile delinquency preventive and rehabilitative services (42 U.S.C. 3841).

[38 FR 17982, July 5, 1973; 40 FR 18173, Apr. 25, 1975].

No. 78-86

In the Supreme Court of the United States

OCTOBER TERM, 1978

BLAIR LEE, III, ETC., ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners seek review of an order of the court of appeals affirming a preliminary injunction. Petitioners were the prevailing parties in both lower courts. In its present posture, this case does not warrant consideration by this Court.

The State brought this suit against the Department of Health, Education, and Welfare and certain of its officers, seeking to enjoin the Department from pursuing administrative enforcement proceedings against the State's system of higher education under Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U.S.C. (and Supp. V) 2000d *et seq*. Petitioners alleged that in effectuating its statutory responsibilities, the Department was

acting in an arbitrary and illegal manner.[1] The district court issued a preliminary injunction against the Department (Pet. App. 44a) and the Department appealed.

The court of appeals, sitting *en banc*, initially reversed the district court's decision in the Baltimore case and vacated and remanded the decision in this case (Pet. App. 56a-90a). The court divided 4-3 in both cases; it noted that Judge J. Braxton Craven, Jr., had died before the filing of the opinions, but that prior to his death he had concurred in the judgment and had read and approved the majority opinion (Pet. App. 58a). Following motions for reconsideration filed by petitioners, the court of appeals withdrew its prior opinions and affirmed the district court's decision by an equally divided court. The court stated that upon reconsideration it concluded that it had improperly counted Judge Craven's vote because, although he had read and approved the majority opinion, he had not had the opportunity to read and consider the dissenting opinions (Pet. App. 93a). The court remanded the cases to the district court for trial, advising the district court "to try them and enter a final order as expeditiously as possible" (Pet. App. 94a).

The Department has not sought review by this Court of the judgment of the court of appeals but plans to request that the district court proceed with any necessary hearings in order to obtain a final decision on the merits of the dispute, which would then be subject to review by the court of appeals. Review of the orders entered by the courts below at

[1]A companion suit was filed against the Department by the Mayor and other officials of the City of Baltimore, alleging similar improprieties by the Department in its attempt to enforce Title VI with respect to the City's public school system. The cases were consolidated in the district court and on appeal.

the present stage of the case is unwarranted.[2] The court of appeals' affirmance by an evenly-divided court is, of course, of no precedential significance, and petitioners were the prevailing parties below. This Court has repeatedly refused to entertain appeals prosecuted by the prevailing parties. See *Perez* v. *Ledesma*, 401 U.S. 82, 87 n. 3; *Gunn* v. *University Committee To End the War in Viet Nam*, 399 U.S. 383, 390 n. 5; *Public Service Commission* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 206. The same principles apply to the Court's certiorari jurisdiction. See Stern & Gressman, *Supreme Court Practice*, Section 2.4 (4th ed. 1969).[3]

[2]While we do not believe that an extensive review of the facts of these cases is necessary here, we note that we do not adopt the statement of facts contained in the petition. We believe that the initial opinion of the court of appeals fairly stated the facts of these two cases [redacted] (see Pet. App. 56a-75a).

[3]Petitioners cite *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, and *United States* v. *Lovett*, 328 U.S. 303, apparently in an effort to suggest that prevailing parties have successfully sought review in this Court in the past. In *Lovett*, however, judgments were entered in favor of the respondent federal employees and against the United States in the lower court. Although the Solicitor General, representing the United States, supported the respondents on the merits, there was no question of the right of the United States to petition for certiorari, since the United States had lost the case in the lower court. In *Hardison*, the Court noted that because the union was technically a prevailing party in the lower court, "[i]t may thus appear anomalous to have granted the union's petition for certiorari as well as that of TWA" (432 U.S. at 70-71 n. 5). But the judgment against TWA, according to the union, "seriously involve[d] union interests" by imposing apparent legal obligations on the union in the enforcement of its collective bargaining agreement (*ibid.*). In any event, the Court noted that since the judgment against TWA was reversed at TWA's own behest, "we need not pursue further the union's status in this Court" (*ibid.*).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1978.

DOJ-1978-09